

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

RIETH-RILEY CONSTRUCTION CO., INC.

and

Case 07-CA-234085

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO

and

Case 07-CB-226531

MICHIGAN INFRASTRUCTURE AND
TRANSPORTATION ASSOCIATION, INC.

*Robert A. Drzyzga, Esq. and Scott R. Preston, Esq.,
for the General Counsel.*

*Stuart R. Buttrick, Esq., Brian J. Paul, Esq., Ryan J.
Funk, Esq., Alexander Preller, Esq., and
Rebekah Ramirez, Esq., (Faegre Drinker), of
Indianapolis, Indiana, for Rieth-Riley
Construction Co., Inc. and Michigan
Infrastructure and Transportation
Association, Inc.*

*Amy E. Bachelder, Esq. (Nickelhoff & Widick PLLC),
of Detroit, Michigan, for Local 324,
International Union of Operating
Engineers (IUOE), AFL-CIO.*

DECISION

CHARLES J. MUHL, Administrative Law Judge. For decades, Local 324 of the International Union of Operating Engineers, AFL–CIO has represented operating engineers employed at Rieth-Riley Construction Co., Inc. throughout the State of Michigan. The operating engineers perform road construction work. In recent times, the Michigan Infrastructure and Transportation Association, Inc. (MITA), a multiemployer bargaining association, represented Rieth-Riley and other road construction contractors for purposes of collective bargaining. The most recent collective-bargaining agreement between MITA and the Union was set to expire on May 31, 2018.

In January of that year and unbeknownst to the Union, Rieth-Riley and other contractors executed a confidential “all-for-one” agreement with MITA. The agreement bound the contractors to multiemployer bargaining with MITA as their representative. It prohibited contractors from negotiating individually with the Union. The agreement gave MITA the authority to direct the contractors to lock out their employees during negotiations. It also subjected the contractors to monetary damages if they breached the agreement.

On May 2, 2018, the Union notified MITA and the contractors that it was withdrawing from multiemployer bargaining for a successor collective-bargaining agreement, as was its legal right. Nonetheless, from that point on throughout the summer of 2018, MITA and Rieth-Riley ignored the Union’s withdrawal notification and continued to pursue negotiations on a multiemployer basis. Being committed to the all-for-one agreement, neither Rieth-Riley nor any other contractor requested that the Union bargain individually with it, either directly with the contractor or with MITA as the contractor’s representative.

In June 2018 following the collective-bargaining agreement’s expiration, the trustees of the Union’s fringe benefit funds decided to hold and stop crediting contributions from any contractor which did not have a collective-bargaining agreement with the Union and had designated MITA as its bargaining representative. After being notified of the funds’ decision in July, Rieth-Riley gave its operating engineers a wage increase of \$2 per hour. The company did not notify the Union of the increase or offer to bargain over it.

In early August 2018 when the funds reaffirmed their decision to not credit contributions, Rieth-Riley and other contractors revoked MITA’s authority to bargain on their behalf, hoping that would alter the funds’ approach. However, the funds instead decided to return to the contractors all the contributions that had been held but not credited.

Then on August 25, 2018, at one jobsite, the Union picketed three contractors who had no contract with the Union at that time. In response, MITA had all the road agreement contractors re-designate MITA as their bargaining representative. MITA then notified the Union that, because of its “strike,” MITA and the contractors would implement a “defensive lockout” on September 4, 2018. MITA also proposed a multiemployer collective-bargaining

agreement between it and the Union and stated the lockout would end when the Union ratified that agreement.

5 Ultimately, the contractors, including Rieth-Riley, locked out their employees from September 4 to 27, 2018. In communications to the Union, the contractors, and the press during the lockout, MITA repeatedly conditioned the end of the lockout upon the Union signing the multiemployer contract. The lockout impacted more than 2000 employees, including 129 at Rieth-Riley. The General Counsel has asserted that the lockout cost Rieth-Riley employees approximately \$1.8 million total. The lockout ended only after the intervention of the then
10 governor of Michigan. Shortly thereafter, the Union and Rieth-Riley began bargaining individually for a successor collective-bargaining agreement.

On July 31, 2019, as those contract negotiations continued and roughly two months after the General Counsel issued the complaint against Rieth-Riley in Case 07–CA–234085, the
15 operating engineers at the company went on strike. That strike, as well as the negotiations for a successor contract, remained ongoing as of May 27, 2021, the last hearing day in these cases.

In Case 07–CA–234085, the General Counsel’s complaint principally alleges that Rieth-Riley’s September 2018 lockout of its operating engineers violated Section 8(a)(5) and (1) of the
20 National Labor Relations Act (the Act). The complaint alleges that Rieth-Riley utilized the lockout in furtherance of the unlawful bargaining objective of requiring the Union to engage in multiemployer bargaining, a permissive subject, by executing a multiemployer contract. The complaint also alleges that Rieth-Riley made four unilateral changes to employees’ terms and conditions of employment. The alleged changes include annual wage increases in 2018, 2019,
25 and 2020, as well as deductions from employees’ paychecks related to fringe benefit fund contributions in 2018. The complaint also alleges that Rieth-Riley’s operating engineers went on an unfair labor practice strike in response to the company’s unlawful conduct. In response to the complaint, Rieth-Riley asserts and pursues no less than 20 affirmative defenses, which significantly muddy the waters. Once the water clears, though, I find merit to the General
30 Counsel’s complaint allegations regarding the lockout and three of the four unilateral changes. However, I also conclude that the General Counsel presented insufficient evidence to establish that the Union’s strike against Rieth-Riley is an unfair labor practice strike.

In Case 07–CB–226531, the General Counsel’s complaint alleges that the Union violated
35 Section 8(b)(1)(B) of the Act on six occasions in the summer of 2018. Specifically, the complaint alleges that union representatives made statements to contractor representatives that the Union would not negotiate a successor (individual) collective-bargaining agreement with a contractor which designated MITA as its bargaining representative. In its answer, the Union denies the

allegations. I find that the evidence presented failed to establish a violation.¹

For 17 days during October 2019, July 2020, and February, March, and May 2021, both in Detroit, Michigan, and by videoconference, I conducted a trial on the complaints. On July 22, 2021, the General Counsel, the Union, MITA, and Rieth-Riley filed posthearing briefs. On the entire record and after considering those briefs, I make the following findings of fact and conclusions of law.²

FINDINGS OF FACT

I. BACKGROUND

MITA is a multiemployer bargaining association formed in 2005 which represents road construction contractors throughout the State of Michigan. MITA has a labor relations division (LRD) with individual members from signatory contractors. The MITA LRD negotiates collective-bargaining agreements with various unions. Michael Nystrom is the executive vice president and secretary of MITA, a role he has occupied since 2010. In total, MITA represents about 500 contractors, 65 or so of which have unionized workforces. Local 324, International Union of Operating Engineers, AFL–CIO (IUOE Local 324 or the Union) represents over 14,000 employees/union members at road construction contractors throughout the State of Michigan. Since May 2016, Ken Dombrow has been the union’s president. Since September 2012, Douglas Stockwell has been the union’s business manager. The MITA LRD and the Union were parties

¹ On December 26, 2018, the General Counsel, through the Regional Director of Region 7 of the National Labor Relations Board (the Board), issued a complaint in Case 07–CB–226531 against the Union. The complaint was premised upon an unfair labor practice charge and amended charges filed by MITA on August 28, 2018, September 13, 2018, and November 26, 2018. On January 9, 2019, the Union filed its answer denying the substantive allegations. On May 29, 2019, the General Counsel issued a complaint in Case 07–CA–234085 against Rieth-Riley. The complaint was premised upon a charge filed by the Union on January 11, 2019. On June 11, 2019, Rieth-Riley filed its answer denying the substantive allegations and asserting numerous affirmative defenses. Via order dated June 28, 2019, the Regional Director consolidated the two cases for hearing.

² In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. My findings and conclusions are based on my review and consideration of the entire record. In assessing witnesses’ credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility resolutions in my findings of fact. Hearsay statements in exhibits are relied upon where corroborated by the testimony of witnesses. See *Rome Electrical Systems*, 356 NLRB 170 fn. 4 (2010).

to a collective-bargaining agreement from March 19, 2013, to May 31, 2018, covering highway and road construction in Michigan (the road agreement).³

5 Rieth-Riley Construction Co., Inc. (Rieth-Riley or the company) is a heavy highway construction contractor which performs asphalt paving and other road construction work throughout Michigan. The company's headquarters is in Goshen, Indiana. Since 2009, Keith Rose has been Rieth-Riley's president and, in 2011, he also became its chief executive officer. Chad Loney is a regional vice president who oversees Rieth-Riley's Michigan operations. For the 2013–2018 road agreement, Rieth-Riley was a MITA member. Pursuant to a previously
10 signed power of attorney (POA), Rieth-Riley designated MITA as its agent to negotiate and sign collective-bargaining agreements with IUOE Local 324. Rose was a member of the MITA LRD during the term of the road agreement, as well as in the summer of 2018 following the road agreement's expiration. The road construction season in Michigan is seasonal and runs from early April to the end of November depending on the outside temperatures. Each summer,
15 Rieth-Riley employs about 130 to 170 operating engineers represented by the Union.⁴

Ajax Paving Industries is a road construction contractor with a main office in Detroit. In 2016, 2017, and 2018, Ajax was a member of MITA and had a signed POA designating MITA as its bargaining representative with the Union. Since 2003, Mark Johnston has been Ajax's
20 president. In 2018, Johnston served on and was one of the negotiators for the MITA LRD.⁵

In 2012, the State of Michigan passed a right-to-work law which became effective on March 28, 2013, and applied to "an agreement, contract, understanding, or practice that takes effect or is extended or renewed after the effective date." Because the effective date of the road
25 agreement was March 19, 2013, the right-to-work law did not immediately apply to the agreement and would not until any successor contract was reached following the road agreement's May 31, 2018 expiration.⁶

The 2013–2018 road agreement required signatory employers to only subcontract work to subcontractors who agreed to comply with the wage rates and other terms and conditions of
30 employment in the agreement. In the summer of 2014, Stockwell sent a request to MITA for

³ Tr. 1405–1406, 1409–1411. At the hearing, the Union admitted, and I so find, that the Board has jurisdiction in Case 07–CB–226531. The Union also admitted that MITA and MITA employer-members Hoffman Brothers, Inc.; Payne and Dolan, Inc.; R.L. Coolsaet Construction Co.; and Zenith Tech Inc. are Sec. 2(2), (6), and 7 employers. (Tr. 20–21.)

⁴ GC Exh. 48; Tr. 1504–1513, 1648. In its answer to the General Counsel's amended complaint in Case 07–CA–234085, Rieth-Riley admitted, and I so find, that the Board has jurisdiction in that case and Rieth-Riley is a Sec. 2(2), (6), and (7) employer. The parties also stipulated that Nystrom was a Sec. 2(13) agent of Rieth-Riley for purposes of bargaining with the Union during the time periods in which MITA held a POA for such bargaining. (Tr. 12–13.) The POA has no text regarding whether MITA's appointment as bargaining representative was for multiemployer or individual bargaining, or both.

⁵ Tr. 47–53.

⁶ MICH. COMP. LAWS ANN. § 423.14 (West 2013).

signatory contractors to sign an additional agreement requiring them to guaranty any fringe benefit fund payments not made by subcontractors. In his response, Nystrom noted that the Union previously signed a memorandum of understanding (MOU) with MITA which ran through May 31, 2018. According to Nystrom, the MOU guaranteed that signatory employers
 5 would not be liable for the failure of any subcontractor to comply with the wage rates and other terms and conditions of the road agreement. Nystrom concluded by saying that MITA would treat the Union's communication "as a mid-term request to modify the CBA, which is rejected and must be dropped by the Union."⁷

10 In April 2015, the Union, via Stockwell, began negotiations for a successor contract with the Association of General Contractors (AGC). Like MITA, AGC is a multiemployer association which negotiates collective-bargaining agreements for its members. The AGC contractors perform commercial and industrial construction. Scott Fisher, then AGC's vice president of labor relations, negotiated on AGC's behalf for the contractors who had given POAs to AGC.
 15 All of those contractors had Section 8(f) bargaining relationships with the Union. Negotiations occurred both before and after the collective-bargaining agreement at issue expired. The two sides met approximately 8 to 10 times but, in February 2016, the negotiations broke down. Thereafter, Fisher received reports from five different contractor representatives about the Union's conduct at certain construction sites. One of those representatives was John Kersaan, a
 20 vice president for Grand River Construction. He reported to Fisher that the Union either had gone on strike or picketed five jobsites for varying time periods, from a day or two to sporadically over a few weeks. When the Union did so, all work stopped on the jobsites. All five contractors had representatives on AGC's negotiating committee with the Union. Eventually, two of the five contractors withdrew their POAs from AGC, continued negotiations
 25 on their own with the Union, and ultimately agreed to a contract. However, the two contractors did not sign individual collective-bargaining agreements with the Union. Instead, they restored their POAs with AGC and AGC then adopted the contract (the "AGC agreement") for them and all of AGC's other members with whom it had POAs. Fisher was in regular contact with MITA's Nystrom during this time period and conveyed all of this information to Nystrom. In
 30 turn, Nystrom communicated the information to the MITA LRD for IUOE Local 324. Similarly, Kersaan conveyed this information to Rieth-Riley's Rose in 2016.⁸

II. THE DISCUSSIONS BETWEEN THE UNION AND CERTAIN MITA POA CONTRACTORS PRIOR TO 2018

35 In May 2016, Rieth-Riley's Rose and Loney met with the Union's Stockwell and Heath Salisbury, a union representative. The issues they discussed were revising the subcontracting clause to limit hiring to union subcontractors, as well as establishing a hiring hall in response to the right-to-work law. On subcontracting, Rose told the union representatives that it was not

⁷ GC Exhs. 2 (contract p. 35), 85; Tr. 1945–1946.

⁸ Tr. 1420–1423, 1559–1566, 2075–2090, 2097–2102, 2115–2132. Fisher and Kersaan testified about the reports they received concerning the Union's conduct. This hearsay testimony was not offered for the truth of the matters asserted. No direct evidence was adduced regarding the Union's conduct and any impact it had on employers' businesses.

possible for Rieth-Riley to hire only union subcontractors in areas of Michigan outside of metro Detroit and its surrounding counties. Noting most of the rest of the state was nonunion, Rose and Loney said such a clause would end up reducing the amount of work Rieth-Riley could get in those nonunion areas. On the hiring hall, Rose said Rieth-Riley had a long practice of hiring and training its own people and would get no benefit out of using a hiring hall in its business.⁹

From 2016 to August 2018, Johnston from Ajax Paving served as the lead communicator with the Union for the MITA LRD. On May 27, 2016, Johnston emailed Stockwell to request a meeting between the Union and 8–10 larger union contractors. The email recipients included a handful of representatives from contractors who were MITA members and had POAs with MITA, including Rose from Rieth-Riley. The recipients also included representatives of employers who did not have POAs with MITA. Johnston wrote that the purpose of the meeting was to “discuss all of our futures and how we want to become stronger union contractors.” He further stated that open communication between the contractors and the Union was needed, so the contractors could discuss their concerns and hear what the Union’s game plan was going forward. Johnston told Stockwell that he wanted a discussion “from the 10,000 [foot] viewpoint.” He closed by saying a MITA representative would not be at the meeting.¹⁰

On June 13, 2016, the group met. Dombrow, Stockwell, and Salisbury attended for the Union while Johnston and Rose were two of the contractor representatives. They discussed subcontracting and a hiring hall. Stockwell provided the contractor representatives with a copy of the union’s hiring hall agreement for employment referrals. Nystrom did not attend the meeting. However, three days after the meeting, Nystrom emailed that hiring hall agreement to the members of the MITA LRD. Two days later, Rose responded to that email and said he was extremely opposed to the proposal, because he saw it as a means for the Union to exert control over Rieth-Riley’s workforce.¹¹

For the next several months, Johnston and Stockwell exchanged numerous emails trying to find a date to continue the contractors’ dialogue with the Union about subcontracting and the hiring hall. In one of the emails, Stockwell told Johnston “I truly look forward to meet from time to time with you guys.”¹²

The next meeting ultimately occurred on January 25, 2017. About a dozen contractor representatives attended the meeting. Dombrow, Stockwell, and Salisbury again were present for the Union, as were Rose and Johnston for the contractors. The group discussed the fact that the existing contract was getting close to its expiration date and they needed to start

⁹ Tr. 1514–1515, 1651–1652. The record evidence contains no additional testimony concerning what was discussed at the meeting, including whether the union’s subcontracting language or hiring hall agreement was proposed as a mid-term contract modification, a change to be incorporated in a successor contract, or neither.

¹⁰ C. Exhs. 11–14; Tr. 1516–1517, 1629–1630.

¹¹ Tr. 1518–1522; C. Exhs. 1, 15.

¹² C. Exhs. 16–18, 135.

negotiations on a successor agreement. They also noted that subcontracting and a hiring hall were issues that would surround the negotiations. The Union again presented the contractor representatives with a hiring hall agreement.¹³

5 On November 29, 2017, some 11 months later and about 6 months prior to the road agreement's expiration date, Stockwell emailed Johnston and said that he wanted to sit down with the Union's signatory road agreement contractors "to discuss the future, as well as some ongoing issues." Although the meeting was going to be scheduled for some time in January 10 2018, Stockwell cancelled the meeting via email on December 15, 2017, due to a "current arbitration with MITA and other court dealings." He called it a temporary postponement and stated he looked forward to rescheduling later in the year.¹⁴

III. EVENTS AND COMMUNICATIONS FROM JANUARY 1 TO MAY 31, 2018

15 A. *The All-For-One Agreement*

On January 9, 2018, Rieth-Riley, through Rose, executed a "multiemployer bargaining agreement" (the "all-for-one agreement") with the MITA LRD negotiating committee. The agreement was developed by Nystrom and Rose to set forth the contractors' game plan for 20 negotiations for a successor road agreement with the Union. As with its previously executed and still valid POA with MITA, Rieth-Riley agreed to have the MITA LRD negotiating committee represent it in bargaining with the Union for a successor contract. The agreement also prohibited Rieth-Riley from negotiating or entering into any separate or individual agreement with the Union for work covered by the road agreement. It required that Rieth-Riley 25 notify MITA if the Union attempted to bargain separately with Rieth-Riley. The agreement also contained the following provision regarding work stoppages:

30 The MITA LRD is authorized to make decisions binding each contractor regarding any labor dispute resulting from the negotiations, including the obligation of each and all contractors to cease work in the event of a strike and if directed to do so, to lock out their employees who are members of Local 324 and who perform road work within the scope of the labor agreement being renegotiated, and therefore not to permit such covered employees 35 to perform any work within the scope of the MITA LRD agreement.

¹³ Tr. 62-63; 1652-1657, 1674; C. Exh. 20.

¹⁴ C. Exhs. 21, 134. Johnston testified that the discussions between contractors and the Union in the 2016 and 2017 meetings were "just informational." (Tr. 1040.) Dombrow, the union president, stated that the purpose of the meetings was to have discussions with some of the contractors, but did not recall anyone talking about the next contract or provisions therein. (Tr. 2195.) I credit the consistent testimony of these witnesses.

The agreement stated it was a “confidential document” which could not be disclosed by any contractor to the Union, absent the consent of the MITA LRD. Any breach of the agreement by a contractor subjected it to “damages and other legal or equitable recourse.” In addition to Rieth-Riley, another roughly 40 contractors signed the all-for-one agreement, including Ajax Paving and a company called Hoffman Brothers.¹⁵

In that same month, Rose drafted up talking points that were provided to MITA POA contractors and non-MITA POA contractors who typically signed on to the road agreement negotiated by MITA and the Union. He stated that the Union would work to try and divide the contractors “as they did with AGC in 2016.” Rose noted that the Union’s desire for a hiring hall and limiting subcontracting to union subcontractors were nonstarters for MITA signatory contractors. He opined that the contractors’ best approach was one for all and all for one. Rose added that if a work stoppage happened, it would be best if it happened on the contractors’ terms. Then he specifically stated: “If one company is struck or picketed by OE324, then ALL companies who signed the Bargaining Agreement [all-for-one agreement] will lock out ALL OE 324 covered employees from ALL projects.”¹⁶

B. The Arbitrator’s Award on the Union’s Subcontracting Grievances

On January 18, an arbitrator issued a decision on three grievances the Union filed in 2016 and 2017 against Ajax Paving and two other road agreement contractors. The grievances alleged a violation of the subcontracting clause in the existing road agreement. As described above, that provision required contractors to only subcontract with companies that agreed to adhere to the rates and other terms and conditions of the road agreement. The grievances sought fringe benefit fund contributions from the three contractors related to subcontractors who had performed work for them but not paid those contributions. The arbitrator granted summary judgment to the contractors. The arbitrator found that, from 1961 to 2014, the Union never had claimed that the subcontracting provision required nonsignatory subcontractors to contribute to fringe benefit funds or that subcontractors had made such contributions. As discussed above, the arbitrator noted Stockwell’s June 2014 letter to MITA seeking to require subcontractors to make fringe benefit fund contributions and Nystrom’s subsequent rejection of that proposal to modify the contract mid-term. Thus, the arbitrator found the union’s grievances untimely, having not been filed until, at the earliest, in April 2016. The arbitrator also found that the language of the subcontracting provision was ambiguous as to the subcontractors’ obligations to the funds. Noting the lack of such payments for decades under the provision, the arbitrator concluded the Union had presented insufficient evidence that the collective-bargaining agreement required such payments. The arbitrator suggested to the Union that it take up the issue in upcoming contract negotiations.¹⁷

¹⁵ GC Exhs. 57, 77, 79; C. Exh. 22; Tr. 67, 71–72, 114–115, 679–681, 1425–1427, 1592. All dates hereinafter are in 2018, unless otherwise specified.

¹⁶ U. Exh. 19.

¹⁷ GC Exh. 84.

C. The Union's Withdrawal from Multiemployer Bargaining

On that negotiation front, the collective-bargaining agreement between MITA and the Union was set to expire May 31. It had the following "termination" provision:

This Agreement shall remain in full force and effect until the first day of June 2018, and thereafter shall continue in force from year to year, unless either party hereto shall notify the other party in writing at least sixty (60) days prior to the end of the current term [April 1, 2018] or, as the case may be, sixty (60) days prior to the end of any additional contract year, of its intention to make changes in or terminate this Agreement. Such written notice shall specify any changes or amendments desired by the party giving such notice and shall be sent by certified mail to the other party.¹⁸

Via letter dated February 19, Nystrom told Stockwell that "the Labor Division of the Michigan Infrastructure & Transportation Association will terminate the above-referenced Collective-Bargaining Agreement on June 1, 2018." Nystrom asked Stockwell to provide dates when Stockwell would be available to negotiate a successor agreement.¹⁹

On February 21, Stockwell sent a letter to Rose at Rieth-Riley stating:

This letter is the notice to you as provided for in the Agreement between your Company and the International Union of Operating Engineers, Local 324, AFL-CIO, that the Union desires *to terminate* the above referenced Collective Bargaining Agreement effective June 1, 2018. (Emphasis added.)

Stockwell sent the same letter to all of the road agreement contractors represented by MITA. On that same date, the Union sent a letter to Nystrom at MITA, which stated:

This letter is the notice to you as provided for in the Agreement between your Company and the International Union of Operating Engineers, Local 324, AFL-CIO, that the Union desires *to make changes* to the current Collective Bargaining Agreement now in effect, for wage increases and other items to become effective June 1, 2018. (Emphasis added.)

The Union hereby offers to meet and confer for the purpose of

¹⁸ GC Exh. 2, contract p. 38.

¹⁹ GC Exh. 4. Nystrom sent this same language to the Union back in 2013 prior to successor contract negotiations which resulted in the 2013-2018 road agreement. (C. Exh. 8.)

negotiating a new contract, and we reserve the right, during the course of negotiations, to introduce additional challenges.

5 Brenda Falsetta, then an administrative assistant for the Union, prepared and sent this letter to MITA with Stockwell's stamped signature. The letter was supposed to state the Union was terminating the road agreement, as it had stated in all the letters to MITA contractors. However, Falsetta mistakenly produced and sent a contract reopener letter instead. Falsetta also sent notices to the Federal Mediation & Conciliation Service (FMCS) indicating that the Union was seeking a "reopener" for each of the MITA contractors under the road agreement. 10 MITA also received a copy of that notice, which was identical to FMCS reopener notices it received in the past from the Union before the parties negotiated a successor road agreement. At this time, Stockwell was not aware of Falsetta's error.²⁰

15 On March 26, the Union held one of its annual regional contractor business luncheons, where the Union and contractors get together to discuss the health of the Union, its fringe benefit funds, and its relationship with the contractors. At the meeting, Stockwell got up and told everyone how much he hated employer associations, because all they did was drive a wedge between contractors and the Union. He also said he knew MITA guys were in the room. At another meeting in March, Nystrom told Stockwell that they needed to start getting dates 20 together for contract negotiations. Stockwell asked Nystrom to provide potential dates which Stockwell could consider.²¹

On April 11, Nystrom emailed Stockwell and offered May 8 and 10 as dates for the Union and the MITA LRD to meet and negotiate the successor road agreement. Johnston and 25 other members of the MITA LRD negotiating committee were carbon copied on the email. Stockwell did not respond to this communication.²²

On April 26, Stockwell discovered on MITA's website the road agreement reopener letter that Falsetta mistakenly sent to MITA on February 21. He immediately told his executive 30 assistant, Andrea LaLonde, to terminate Falsetta. LaLonde did so that same day. At no point thereafter did Stockwell notify MITA that the reopener letter had been sent in error.²³

²⁰ GC Exhs. 5-7; Tr. 285-287, 322, 325-326, 328, 1149, 1154, 1429-1430, 1440. Falsetta made the same error with respect to a different collective-bargaining agreement, the distribution agreement, between MITA and the Union covering gas line work. (U. Exh. 6.)

²¹ Tr. 1440-1441, 1655-1658.

²² C. Exh. 27; Tr. 1441, 1530.

²³ Tr. 317-318, 902-905, 1151-1154, 1215-1216. I credit Stockwell's frank and reliable testimony that he terminated Falsetta for sending reopener letters as to both the road and distribution agreements. His testimony reflected genuine, continuing anger over Falsetta's error. I reject Rieth-Riley's argument that Stockwell did not rely upon the road agreement reopener when terminating Falsetta. The fact that the Union sent termination letters to all road agreement contractors corroborates Stockwell's testimony that the same letter was supposed to be sent to MITA. I also credit Andrea LaLonde's testimony that the termination letter she sent to Falsetta erroneously referenced only the mistaken reopener letter for the

Then on May 2, Stockwell sent a letter to Nystrom which stated:

I am in receipt of your letter sent February 19th, 2018 terminating the Agreement. International Union of Operating Engineers Local 324 accept the same. Further, we hereby withdraw from multiemployer bargaining with MITA for road.

On that same date, Stockwell emailed the same text to Johnston and the other MITA LRD representatives.²⁴

On May 14, Johnston sent Stockwell an email expressing confusion about Stockwell's May 2 letter stating the Union was withdrawing from multiemployer bargaining. He questioned the efficiency of negotiating individual contracts with the more than 50 signatory union contractors represented by MITA. He asked what had changed since Stockwell sent the reopener letter on February 21. He asked Stockwell to reconsider his position and to meet with the MITA LRD representatives to start contract negotiations.²⁵

On May 18, Nystrom sent a letter to Stockwell stating that he had not received a response from Stockwell to his April 11 email requesting bargaining dates. He then said that the MITA LRD "offers the attached first proposal to initiate negotiations" while referencing the Union's February 21 reopener letter which was sent in error. This was the first contract proposal that MITA made to the Union. The proposal was a one-page document offering a contract term of 5 years and wage increases each year. The signature page indicated the parties to the contract proposal were MITA and the Union. Nystrom's letter made no mention of Stockwell's May 2 notification to Nystrom that the Union was withdrawing from multiemployer bargaining with MITA. Nonetheless, also on May 18, MITA advised its POA signatory contractors on the road agreement that the Union had refused multiple requests to meet and bargain for a successor contract and had informed MITA that it was withdrawing from multiemployer bargaining.²⁶

On May 23, Nystrom provided Stockwell with a list of 57 union contractors who had signed a POA with MITA to negotiate the road agreement, along with copies of all of the POA forms. Again, no mention was made of the Union's notification that it was withdrawing from multiemployer bargaining.²⁷

distribution agreement, because she was in a rush to get the letter out that day. That is understandable given Stockwell's angry reaction to Falsetta's error. In addition, LaLonde's testimony appeared trustworthy. (Tr. 1225; C. Exh. 145.)

²⁴ GC Exh. 12.

²⁵ C. Exh. 30.

²⁶ C. Exhs. 27, 32; Tr. 135. MITA's communication with the contractors was a post on a MITA website that only contractors could access. (GC Exh. 63; Tr. 192-194.)

²⁷ GC Exh. 47.

On May 31, the road agreement expired. At that time, the MITA POA contractors employed over 2,000 operating engineers in Michigan, including about 130 at Rieth-Riley.²⁸

5 IV. THE UNION REFUSES TO PROVIDE OPERATING ENGINEERS OR APPRENTICES TO
CONTRACTORS WITHOUT A COLLECTIVE-BARGAINING AGREEMENT

10 In the summer of 2018 following expiration of the road agreement, Union Representative Salisbury spoke to Dan Eriksson, the general superintendent and an owner of Hoffman Brothers. Eriksson also served as a member of the MITA LRD at the time. The company is a road construction contractor located in Battle Creek, Michigan, that employs 75 to 90 workers represented by the Union. Eriksson asked Salisbury about getting operators for his jobs. Salisbury responded he could not help Eriksson right now because they did not have a collective-bargaining agreement. Salisbury said the Union was not going to have an agreement with MITA and, until Eriksson signed a contract outside of MITA, he would not get any operators. Eriksson also spoke to Joe Shippa, another union representative, during this same timeframe. Eriksson asked for workers on a project in the Grand Rapids area of Michigan. Shippa told him he could not send anyone until Hoffman Brothers got away from MITA and signed a contract.²⁹ At the time of these conversations, Hoffman Brothers was a member of MITA and had executed a POA with MITA for bargaining the road agreement. The company also was a signatory to the all-for-one agreement prohibiting it from bargaining individually with the Union. Moreover, Eriksson only was aware of MITA bargaining for a group of employers, not individual contractors. He also knew that MITA was taking the position that it only would bargain with the Union as a group and, conversely, the Union would only bargain with contractors individually.³⁰

30 In July 2018, Union Apprenticeship Coordinator John Hartwell had a conversation with Remi Coolsaet, the president of R.L. Coolsaet Construction, a gas pipeline and distribution company located in Romulus, Michigan. Hartwell was in charge of union apprentices and Coolsaet was on the board as a MITA representative for the Union's joint apprenticeship training center. Coolsaet asked Hartwell if any apprentices were available. Hartwell responded that he did have apprentices but, because the company no longer had a contract with the Union and MITA had its POA, Coolsaet could not get any. Hartwell added that, if Coolsaet signed a new contract that the Union had drafted, Hartwell could give him apprentices.³¹ At the time of

²⁸ Tr. 1450, 1538.

²⁹ The General Counsel's complaint in Case 07-CB-226531 alleges that Salisbury's and Shippa's statements violated Sec. 8(b)(1)(B) of the Act, because they were verbal notifications to employer-members of MITA that the Union would not negotiate a new collective-bargaining agreement with the contractor if MITA was their bargaining representative. (GCCB Exh. 1(c), complaint pars. 10(b) and 10(e).)

³⁰ Tr. 664-665, 668-675, 678-687.

³¹ The General Counsel's complaint in Case 07-CB-226531 alleges that Hartwell's statements violated Sec. 8(b)(1)(B) of the Act. (GCCB Exh. 1(c), complaint par. 10(d).)

this conversation, the company was a member of MITA, had a POA with MITA, and was signatory to a different collective-bargaining agreement between MITA and the Union which had expired. The company also was a signatory to the all-for-one agreement. Coolsaet took Hartwell's reference to MITA to mean multiemployer bargaining and knew the Union was not willing to do that. Coolsaet also was aware that the Union was trying to obtain individual agreements with the contractors.³²

V. THE UNION CEASES TO ALLOW OUT-OF-STATE OPERATING ENGINEERS TO WORK IN MICHIGAN

In Wisconsin, Operating Engineers Local 139 (IUOE Local 139) represents over 7000 operating engineers statewide. Terry McGowen has been IUOE Local 139's president and business manager since 2004. Prior to June 1, 2018, IUOE Local 324 historically permitted IUOE Local 139 operators to cross the state line and work in Michigan. The Wisconsin operating engineers were required by the Union's constitution to "clear in" before doing so, meaning they were supposed to call IUOE Local 324 and get permission to work in the jurisdiction. In practice, this requirement was not strictly followed. Instead, McGowen worked out "traveling customs" with neighboring locals, including IUOE Local 324. In Michigan, this resulted in what McGowen viewed as an "open border." Nonetheless, for decades, most, but not all, IUOE Local 139 members called in to IUOE Local 324 out of courtesy once they arrived to work at a Michigan jobsite.³³

Once the road agreement expired, IUOE Local 324 no longer allowed the IUOE Local 139 operating engineers to work on Michigan jobsites for employers that did not have a contract with IUOE Local 324. When McGowen learned of this in early June, he spoke to Stockwell, who told him it was a contract year and he was devising a means to negotiate individually with contractors. He also said that IUOE Local 139 had such a large workforce in the upper peninsula of Michigan, he could get the attention of contractors up there if he sent the operators home to Wisconsin. During a second conversation between the two in June, McGowen asked Stockwell if any progress had been made and he could get his people back into Michigan.

³² Tr. 1276–1288, 1291–1292, 1297–1301. During his initial testimony, Coolsaet did not state that Hartwell told him one of the reasons he could not get apprentices was because MITA had the company's POA. Instead, he testified that Hartwell said Coolsaet could not get apprentices because MITA did not have a contract with the Union and he could get them if the company signed an agreement the Union had drafted. Thereafter, Coolsaet was asked three times whether Hartwell said anything else to him and answered no. After reviewing his affidavit, he stated that he told the Board agent at the time that Hartwell said he could not give apprentices to Coolsaet because he no longer had a contract and MITA had his power of attorney. Although his recall was poor, I credit the testimony because other witnesses testified to similar statements by union agents to contractor representatives in this timeframe including, as described above, Eriksson.

In addition to Coolsaet, Hartwell had a conversation in the same timeframe with Eric Rau, a heavy highway coordinator for Dan's Excavating, another road construction contractor that had a POA with MITA. When Rau asked for operators, Hartwell similarly told him that Dan's did not have a contract with the Union. (Tr. 695–700, 715–717.)

³³ Tr. 982, 998–999, 1002–1003.

Stockwell responded that McGowen could help by keeping his guys at home in Wisconsin. At some point in their summer 2018 discussions, Stockwell reiterated that his preference was to negotiate with employers on an individual basis and MITA did not work very well with him.³⁴

5 The Walbec Group is a family of Wisconsin-based road construction companies with common ownership. The companies include Payne & Dolan, Zenith Tech, and Northeast Asphalt. The companies perform work in Wisconsin and Michigan, the latter often in the upper peninsula. For their Michigan work, all three companies were signatory to the 2013-2018 road agreement with IUOE Local 324 covering Michigan. In 2018, all three also were members of and
10 had a signed POA with MITA. Payne & Dolan employs approximately 65 to 75 IUOE Local 324 operating engineers on its projects in Michigan. Prior to June 2018, it also employed IUOE Local 139 operating engineers at Michigan jobsites. The Payne & Dolan operating engineers were among those who did not check in with IUOE Local 324 prior to working at Michigan jobsites.³⁵

15 In the summer of 2018, Payne & Dolan was performing paving and related work for a power plant which was being constructed in Negaunee, Michigan. Its project manager there was Paul Johnson. He had 6 to 10 employees onsite, all of whom were represented by IUOE Local 324 except for Shawn Galkowski, a Northeast Asphalt employee represented by IUOE Local 139.³⁶

20 Galkowski reported to the jobsite on June 1. Thereafter, he had multiple conversations with Union Representative Dan Kroll. During the first two, Kroll told him he needed to leave Michigan and was not going to be allowed to work up there. Kroll and union business representative George Edwardson also visited Galkowski at the jobsite on two occasions and
25 spoke to him. During the second conversation on July 31, Kroll told Galkowski he could be fined if he did not leave the jobsite. Prior to June 2018, Galkowski had never been asked to leave a jobsite in Michigan. He also was unaware of clearing in before this job and had not cleared in to the power plant jobsite.³⁷

30 Also on July 31, Galkowski called John Bartozek, the vice president of multiple companies in the Walbec Group, and told him about his conversations with the union representatives. Galkowski then asked Bartozek if he could leave the jobsite and return to Wisconsin because he did not feel safe. Thereafter, Edwardson spoke to Bartozek as well, telling him Galkowski had to leave the jobsite. Bartozek disagreed. Edwardson also asked
35 Bartozek to sign the AGC contract and said the Union was not going to negotiate with MITA.³⁸ At the time of this conversation, Bartozek was aware that MITA negotiated contracts on a multiemployer basis; both Payne & Dolan and Zenith Tech engaged in multiemployer

³⁴ Tr. 967-974, 983-991.

³⁵ Tr. 368, 405-406, 432-434, 451, 480-481, 512, 1001, 1337-1338, 1704-1707.

³⁶ Tr. 370-372.

³⁷ Tr. 1118-1130.

³⁸ The General Counsel's complaint in Case 07-CB-226531 alleges that Edwardson's statement regarding MITA violated Sec. 8(b)(1)(B) of the Act. (GCCB Exh. 1(c), complaint par. 10(c).)

bargaining; and Payne & Dolan wanted to bargain on a multiemployer basis with the Union.³⁹

5 In June 2018, Zenith Tech was working on a new bridge construction project in Escanaba, Michigan. Travis Sonnentag was the construction manager onsite, along with three or four operating engineers from both IUOE Local 324 and IUOE Local 139. Following expiration of the road agreement, Kroll called and spoke to Sonnentag and Valentine Augustine, one of the IUOE Local 139 operators onsite. Kroll said the contract was up, Zenith Tech no longer had an agreement with the Union, and the IUOE Local 139 operating engineers needed to leave the jobsite because they could not run equipment without a contract. Kroll also said
10 that he was not telling the operators they could not work but, if they did not leave, they could be subject to a \$10,000 fine. Kroll added that Zenith Tech needed to drop its POA with or not go through MITA and instead deal directly with the Union.⁴⁰

15 In a subsequent conversation, Kroll told Augustine he could stay there and not be subject to a fine, because he had cleared into IUOE Local 324 before the road agreement expired. However, Kroll told him, anyone who had not cleared in before the contract expiration had to leave. On June 26, Kroll and Salisbury visited the jobsite. They told Augustine that Matt Harder, an IUOE Local 139 operator working there that day, had to leave the jobsite because he had not cleared in before the contract expiration. Salisbury also told him the Union was pulling
20 the IUOE Local 324 engineers off the jobsite. When Augustine asked him how he was supposed to finish the job, Salisbury responded “checkmate.” Harder left the jobsite that day. Zenith Tech was supposed to set beams on July 5, but was unable to do so after the operating engineers left. Sonnentag shut down the job for 2 months.⁴¹

³⁹ Tr. 1704–1705, 1738–1746, 1758–1766. Kroll also called Bartozek and told him Galkowski could not be on the jobsite and had to go back to Wisconsin because he had not cleared in. Bartozek responded that he was not playing the game of the Union trying to starve them of operators. Kroll said that if Zenith Tech signed the Union’s contract with AGC, everything would go away and the Union was not going to negotiate with MITA. Bartozek said he would not sign that contract because they had a national maintenance agreement which covered that jobsite. Kroll’s statement regarding MITA is not alleged as unlawful in the General Counsel’s complaint in Case 07–CB–226531. (Tr. 1740–1744.)

In addition, prior to visiting Galkowski on the jobsite, Kroll and Anderson also called Project Manager Johnson. Kroll asked Johnson if he had Galkowski on the jobsite. After Johnson said he did, Edwardson said Galkowski had to leave because he had not been cleared in by IUOE Local 324. He added that the Union would bring charges against Galkowski if he did not leave the job. Prior to this date and back to the spring of 2017, Johnson did not have any issues bringing in employees represented by IUOE Local 139 onto Michigan jobsites. (Tr. 373–379, 385–387, 399–402.)

⁴⁰ Tr. 1339–1350, 1376–1379. The General Counsel’s complaint in Case 07–CB–226531 similarly alleges Kroll’s statement concerning MITA violated Sec. 8(b)(1)(B) of the Act. (GC Exh. CB1(c), complaint par. 10(a).)

⁴¹ Tr. 1079–1085, 1094–1095. Kroll had five additional conversations with representatives of Walbec Group companies where he informed them that IUOE Local 139 operators could no longer work in Michigan because the companies did not have a contract with the Union. At times, Kroll told IUOE Local 139 operating engineers that he could not require them to leave a jobsite, but IUOE Local 324 might pursue charges with the international union if they did not leave. All of the employees he spoke with

After the job was shut down, Sonnentag spoke to Edwardson and asked him what he could do to get the Escanaba bridge job rolling again. Edwardson responded that they could get operators back as soon as they dropped the MITA POA and negotiated directly with the Union for a contract.⁴²

VI. THE UNION FRINGE BENEFIT FUNDS' DECISION TO ACCEPT BUT NOT CREDIT CONTRIBUTIONS FROM MITA POA CONTRACTORS

The expired road agreement provided a variety of benefits to unit employees through monthly contributions from contractors to the appropriate IUOE Local 324 fund. Those funds include health care, pension, and vacation and holiday (vacation fund). For that last fund, contributions are added on to an employee's base pay, deducted, and then transmitted to the fund by the contractor. The vacation pay was 15 percent of base pay. As a result, vacation pay is included in employees' earnings for computing all payroll withholdings and is taxable wages. At the end of the construction season, employees then can withdraw money from the vacation fund when they are not working. The road agreement also established that each fund would have an equal number of trustees from the Union and the MITA contractors. In 2018, each fund had five or six union trustees and five or six contractor trustees. Any fund action required a majority vote of the trustees, each of whom had one vote. Stockwell served as a trustee on all of these funds. He also was the chairman of the pension and vacation funds, as well as the secretary of the health care fund. Nystrom was a trustee on the pension and health care funds. Each fund also has separate legal counsel. Trustees have a fiduciary duty to the fund they sit on and must protect the participants in the fund.⁴³

Returning now to June 1, the day after the road agreement expired, MITA's Nystrom sent Union Business Manager Stockwell a letter with a proposal from the MITA LRD to extend the expired road agreement, in order to protect employees working under the contract from

decided to leave. Their departures caused delays for some projects. (Tr. 407–409, 411–417, 421–423, 427–428, 480–489, 493–494, 520, 524–530; C. Exhs. 36 and 37.)

I do not credit the testimony of Eric Anderson, a foreman for Northeast Asphalt, that Kroll told him he would take away Anderson's pension benefits if he continued to work in Michigan. (Tr. 1136–1142.) I credit Kroll's denial, as I find it more plausible given that Kroll had no ability to effect Anderson's pension in any way. (Tr. 2264–2265.) Moreover, Kroll's demeanor throughout his testimony about his conversation with Anderson was reflective of reliable testimony. Kroll also candidly admitted that he told Anderson he could be fined if he continued to work on the jobsite. (Tr. 2261–2264.)

I also give almost no weight to the testimony of Dan Ekstrom a human resources manager for a Walbec Group company, concerning his conversation with Kroll. (Tr. 524–528.) Ekstrom exhibited poor recall during his testimony and often gave nonspecific, vague answers to questions.

⁴² Tr. 1362–1367. The General Counsel's complaint in Case 07–CB–226531 also alleges that Edwardson's statement concerning MITA violated Sec. 8(b)(1)(B) of the Act. (GC Exh. CB1(c), complaint par. 10(f).)

⁴³ GC Exh. 2, pp. 26–28; Tr. 200–201, 283, 350–351, 1311, 1327–1328.

having their benefits suspended.⁴⁴ Stockwell responded via letter the same day, stating: "As we have communicated to you previously, we accepted your letter to terminate. We no longer will have a relationship with MITA. The contract is terminated." On that same date, MITA sent a notification to its contractors which stated that they could use an attached form if the Union requested to "sit down independently" with a contractor. According to the letter, the form would officially notify the Union that MITA was bargaining on behalf of the company.⁴⁵ Via letter dated June 6, Nystrom proposed to Stockwell a limited contract extension of just the health fund contributions provision. The Union did not agree to the proposal.⁴⁶

On June 18, Stockwell sent a letter to Nancy Pearce, counsel for the IUOE Local 324 fringe benefit funds (the "funds"). Stockwell stated:

As you may be aware, the MITA Road Agreement was timely terminated by MITA. Local 324 accepted that termination and there is no current Road contract in place. Moreover, Local 324 has withdrawn from multiemployer bargaining. Local 324 does not desire to have a Collective Bargaining Agreement with MITA. Therefore, Local 324 is not negotiating with MITA and there will not be any negotiations in the future to enter into a multiemployer Road Collective Bargaining Agreement.

Stockwell then listed the contractors whom the Union understood had POAs with MITA. He concluded:

Since we have determined it is not in Local 324's members best interest to multiemployer bargain with MITA and/or to have a contract with MITA, there are no ongoing or planned negotiations with these employers. However, Local 324 plans to bargain with all of the other [non-POA] road contractors.

Thereafter, the Union refused to bargain on a multiemployer basis with any MITA-POA contractor. As of the expiration of the contract, the Union also had 135 independent/non-MITA-POA contractors who had signed on to the prior road agreement. Following expiration of the road agreement, the Union began negotiations for a successor contract with certain of those individual contractors. In this same timeframe, the Union and an unspecified contractor

⁴⁴ At this time, both MITA and the Union were under the impression that all of the union contractors which MITA represented for bargaining had Sec. 8(f) bargaining relationships with the Union. In a Sec. 8(f) relationship, either party could repudiate the relationship upon the expiration of the road agreement. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enforced sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied, 488 U.S. 889 (1988).

⁴⁵ GC Exh. 64. Although the letter is in the record, the attached form is not. Thus, it is not possible to determine the exact language in the form regarding MITA's representation of the contractor.

⁴⁶ GC Exhs. 16-17, 64-65; C. Exh. 34; Tr. 291.

negotiated a successor highway, bridge, and airport agreement (the “airport agreement”). Thereafter, a portion of the independent contractors signed on to the airport agreement as a successor road agreement.⁴⁷

5 Also in June, the Union held a meeting for its membership. Stockwell told the group that the MITA road agreement had expired. He added that he did not want to have another multiemployer contract, including with MITA, but instead wanted to bargain one on one with each contractor to reach a contract.⁴⁸

10 On June 19, a specially-called meeting occurred for all of the union’s funds with 12 trustees attending. As the chairman, Stockwell ran the meeting. It began with review of a letter from MITA to Pearce, the funds’ attorney, stating that, although no successor contract had been reached, contractors continued to work and MITA believed the funds should accept contributions from those contractors. MITA asked for a trustee vote on this if no past precedent
15 existed. The trustees also reviewed Stockwell’s June 18 letter to Pearce. Thereafter, Stockwell stated that the Union would not negotiate with MITA or any contractor which had a POA with MITA. The trustees then discussed how, in 2016, the Union’s contract with AGC expired and the fund trustees accepted and held fund contributions from contractors who signed a POA with AGC. Stockwell stated that the current situation was different because the road agreement
20 had been terminated and no contract negotiations were occurring with MITA POA contractors. The trustees also discussed the difference between a Section 8(f) and 9(a) bargaining relationship. Stockwell said the difference did not matter in the current situation, because the contract had expired. (Again, at the time, the trustees believed that all of the road agreement contractors had a Section 8(f) relationship with the Union.) The management trustees then
25 discussed what should be done with contributions submitted by contractors. Noting that the best interest of participants was to continue receiving benefits, the management trustees questioned whether the trustees owed those benefits to the participants. A management trustee asked whether the road agreement had been timely terminated. Stockwell provided the trustees with MITA’s February 2018 letter to the Union stating the contract had been
30 terminated. He also provided them with the Union’s May 2018 letter stating it was withdrawing from multiemployer bargaining. At that point, Dombrow, the union’s president and a trustee, moved that the funds accept contributions from contractors who did not have a POA with MITA. The motion passed by a count of 10-2. Management trustees asked whether they owed the same action to MITA POA contractors. Stockwell responded they could not
35 accept those contributions, leading the management trustees to caucus. Following the caucus, a management trustee, Glenn Bukoski, moved that the funds also accept contributions from MITA POA contractors. Speaking over the trustee, Stockwell loudly responded “On what basis? Give me the legal basis.” The trustees vote resulted in a tie and the motion not passing. Thereafter, Stockwell commented to Pearce that he was concerned about MITA remaining a
40 fund sponsor, the number of trustee positions MITA held, and how to remove them as trustees.

⁴⁷ C. Exh. 159, fund pgs. 0216–0217; Tr. 780–781, 976–978.

⁴⁸ Tr. 1179, 1187, 1194–1196.

At the end of the meeting, the trustees directed the funds to accept and hold contributions from MITA POA contractors, without a formal vote on a motion.⁴⁹

As a result of the trustees' decision to hold contributions, unit employees faced the prospect of losing their health insurance and other contractual benefits. However, apparently unbeknownst to MITA or Rieth-Riley, the Union thereafter paid for the health insurance of any employee of a MITA POA contractor who would have lost their insurance. The payments were made from the Union's strike fund.⁵⁰

VII. RIETH-RILEY'S JULY 23 WAGE INCREASE TO EMPLOYEES

On July 16, the union's fringe benefit funds office sent notification to Rieth-Riley of the trustees' decision and the office's inability to credit any contributions. The letter also stated that the funds were disclaiming any liability resulting from the nonpayment by a contractor of the vacation fund contributions, which were considered "wages."⁵¹

On July 18, MITA notified all MITA POA contractors of the funds' action and set forth suggestions on how the contractors should respond. After noting that the funds were holding and not crediting submitted contributions, the notification said the contractors should continue submitting the contributions until further notice. It went on to describe an issue specific to the vacation fund contributions, because the contributions were treated as income to employees. MITA suggested that the employers cease the 15-percent pay deduction and instead pay that money to the employees. The notification then stated that the contractors should cut each road agreement employee a retroactive check for vacation fund contributions back to June 1.⁵²

On July 20, Stockwell sent a letter to Loney at Rieth-Riley to "clarify some misconceptions" about the MITA road agreement. Stockwell said that MITA terminated the agreement, the Union accepted the termination, and the Union withdrew from multiemployer bargaining. He noted the Union sent timely contract termination letters to all of the road agreement contractors. Stockwell then advised that members had been calling the Union and reporting that some companies were telling them that there were or would be negotiations for a multiemployer MITA contract. Stockwell said "[t]his is false."⁵³

On July 23, Rose and Loney sent a letter to all Rieth-Riley employees represented by the Union. The letter first informed them that vacation fund contributions would now be paid in

⁴⁹ In reaching these findings of fact, I rely upon Bukoski's detailed and credible testimony, as well as the meeting minutes, and do not credit any conflicting testimony. (Tr. 2030-2040; C. Exh. 159.) That determination also applies to subsequent trustee meetings.

⁵⁰ Tr. 820-822, 826; C. Exhs. 138, 167.

⁵¹ GC Exh. 20.

⁵² GC Exh. 76.

⁵³ GC Exh. 21.

their checks (without being simultaneously deducted and sent to the fund) to be compliant with Federal law, “as a result of Local 324’s refusal to credit fringe payments.” The letter also stated:

Due to the inconvenience to employees, created by Local 324, the company will proceed with an economic increase even though a new contract is not yet in place. Beginning with the current pay period, your base wage will be increased by \$2 per hour until a new contract is in place. Once a new contract is in place, from that date forward, your base wage and fringes will be adjusted to the new rates.

Following the announcement to employees, Rieth-Riley implemented the wage increase retroactive to June 1.⁵⁴ The company did not provide the Union with notice of or an opportunity to bargain over the increase. Consistent with MITA’s suggestions, the company also ceased deductions from employees’ paychecks to fund contributions to the vacation fund. After the cessation, employees retained that portion of their pay. Rieth-Riley took these actions due to a concern that not doing so would result in the company being non-compliant with the federal Davis-Bacon Act. That law requires contractors working on publicly funded projects to pay a total prevailing wage and benefit rate to employees or risk not being paid for work on the projects. A majority, but not all, of the work Rieth-Riley performs in a given construction season is covered by the Davis-Bacon Act. Rieth-Riley also pays operating engineers the same total compensation for non-Davis-Bacon Act work.⁵⁵

VIII. THE ROAD AGREEMENT CONTRACTORS RESCIND THEIR POWERS OF ATTORNEY WITH MITA

On July 31, the fund trustees held a second specially-called meeting, which Stockwell again ran as chairman. The meeting began with review of a letter from Nystrom to the funds again advocating for accepting contributions from MITA POA contractors because their employees continued to work under the terms of the expired road agreement. MITA proposed a fund participation agreement to do so. After review of the correspondence, Nystrom stated

⁵⁴ The total compensation increase was \$2.80 per hour. The wage increase resulted in a \$0.30 per hour increase to vacation fund contributions (15 percent of the wage increase, per the road agreement). In addition, Rieth-Riley increased its contribution to the pension fund for each employee by \$0.50 per hour. Back in 2011, the funds adopted a “rehabilitation plan” as a result of underfunding which put the funds in critical status. The plan had a 10-year duration and called for increases in contributions each year. The increased payments were necessary to comply with the Employee Retirement Income Security Act (ERISA). (GC Exh. 2, contract p. 28, Art. V, Sec. 4(a); C. Exhs. 212, 214; Tr. 2357–2359, 2365–2366.)

⁵⁵ GC Exh. 22, C. Exhs. 3, 88, 214; Tr. 1542–1543, 1633, 1640, 2364–2366, 2381, 2385–2386, 2390, 2405–2406, 2411–2412. Rose testified that Rieth-Riley “historically” had given its operating engineers a wage increase each June of “plus or minus a dollar per hour” and that this \$2-per-hour base pay increase was higher than in years past. (Tr. 1544–1545.) The 2013–2018 road agreement called for annual compensation increases of \$1.40 per hour the first 3 years and \$1 per hour the last 2 years. The agreement also gave the Union the right to allocate the increases between wages and fringe benefit fund contributions. (GC Exh. 2, contract pp. 8–11.)

that the trustees had a fiduciary responsibility to protect plan participants' interests and it was wrong to treat contractors in the same industry differently. Stockwell responded that perhaps the trustees should discuss the difference between the definition of "expiration" and "termination." The trustees first voted on whether to return contributions from MITA POA contractors and the vote tied. Then MITA made a motion to accept the contributions and the vote tied. Finally, a third motion sought to allow employees to self-pay or use their hours banks to maintain health insurance. (Hours banks are hours employees earn and then can use to pay for health care during off season in the construction industry.) That vote likewise tied.⁵⁶

On August 7, Johnston, from Ajax, requested a meeting with Stockwell which also would be attended by Tom Stover, the president of another road construction contractor, Toebe Construction. On August 8, Stockwell responded that he was busy until September 1, but willing to sit down for "coffee or something" after that date.⁵⁷

Later that same day, Nystrom sent a letter to Stockwell stating:

This letter shall serve as formal notice to you that [MITA] rescinds Power of Attorney (Road) authority for the attached list of contractors.

Each of these contractors now expects that fringe checks will now be accepted, cashed and credited to the appropriate employees, based on the resolution that was approved at the OE 324 Special Board of Trustees Trust Fund meeting on June 19, 2018.

Rieth-Riley, Ajax, and Hoffman Brothers were contractors on the attached list. MITA decided to have the contractors rescind their POAs in the hopes that the funds would reverse course and accept such contributions, as they were doing for independent contractors who did not have a POA with MITA.⁵⁸

⁵⁶ Tr. 2041–2044; C. Exh. 160; see also Tr. 1317–1319, 1455–1456.

⁵⁷ C. Exh. 46.

⁵⁸ GC Exh. 23; Tr. 1462–1463. I do not credit Nystrom's self-serving testimony that another purpose of the POA rescissions was for the contractors to have the opportunity to negotiate independently with the Union. Nystrom's letter to Stockwell made no mention of successor contract negotiations. In particular, the letter did not state that a contractor now would seek to bargain with the Union on an individual basis with MITA as its bargaining representative. Moreover, this testimony is not corroborated by any other witness or stated in any of the numerous communications between MITA and the contractors in this time period. In fact, Eriksson testified to the contrary. (Tr. 678, 687–688.) Furthermore and as will be discussed below, Johnston was the only contractor representative who talked to Stockwell in August after the POA rescissions and Johnston never asked the Union to bargain on an individual basis. At most, Johnston suggested that Ajax and another group of contractors were interested in forming a different association and multiemployer bargaining with the Union. Finally, Nystrom's demeanor when providing this testimony was not indicative of trustworthiness.

That same day, Nystrom notified the MITA POA contractors of MITA's rescission of those POAs for companies working under the road agreement. Nystrom stated that the action was taken so that the Union would resume accepting fund contributions. He suggested the contractors revert back to making fund contributions as they had before the road agreement expired, including ceasing to pay vacation fund contributions directly to employees. He also told them that a group of contractors would reach out to other, individual contractors to discuss potential contract negotiations. He stated that, if the Union communicated with a contractor directly, the contractor should feel free to contact the MITA office. That afternoon, Johnston emailed Stockwell, noted that Ajax and other union contractors had dropped their POAs with MITA that day, and offered September 4 as a date to "meet with a group of contractors to discuss a path forward." He also told Stockwell that he and a representative from one other contractor wanted to meet before that date "to lay out our thoughts to get us all back at the bargaining table" and get Stockwell's input.⁵⁹

Following receipt of Nystrom's letter, Stockwell sent another letter to Pearce, dated August 8, copying Nystrom. Stockwell told Pearce that, despite what Nystrom said, the Union had no proof that individual contractors revoked their POAs as required by the POA's terms. He further stated that the Union had no evidence the contractors would enter into anything but an association agreement, suggesting MITA's action was some sort of "ruse." Stockwell concluded by telling Pearce that the union's position continued to be that the funds could not accept contractor contributions and that the contributions submitted (after June 1) had to be returned.⁶⁰

On that same date, the fund trustees held a third specially-called meeting. At the start, the trustees reviewed an August 2 letter from the Union stating that MITA POA contractor employees could utilize their hours banks or self-pay to obtain health insurance on an interim basis. Dombrow then moved to return all contributions from MITA POA contractors which the funds had accepted and held. Although the trustees' vote on the same motion tied at the July 31 meeting, this time the motion passed. Two management trustees, James Oleksinski and Milford Woodbeck, changed their votes from no to yes.⁶¹

⁵⁹ GC Exh. 67; C. Exhs. 43, 47.

⁶⁰ GC Exh. 24.

⁶¹ Tr. 1853–1854, 1857–1861; C. Exh. 162. I credit Oleksinski's testimony concerning why he changed his vote. Oleksinski testified that, over the course of the three specially-called meetings, the trustees had numerous discussions concerning whether the funds could accept contributions when a contractor and the Union did not have a collective-bargaining agreement in place. He stated that, as of the August 8 meeting, he finally concluded that such contributions could not be accepted, finding the explanation given by the funds' counsel to be more persuasive than that from MITA's attorney. Moreover, Oleksinski testified that his vote change was influenced by the Union agreeing to allow employees to obtain health insurance through their hours banks or self-paying. In particular, Oleksinski stated the move put "meat on the bone" and insured employees would not be harmed by the funds' refusal to accept contractor contributions. Oleksinski was assured and detailed when providing this testimony and his demeanor was indicative of the testimony being reliable.

I likewise credit Woodbeck's testimony that he changed his vote because he finally became

On August 9, Nystrom posted again on the contractors' website and requested that each contractor individually rescind its POA with MITA. Nystrom said the Union was insisting on it. Rieth-Riley and the other contractors then did so.⁶²

On that same date, the funds sent out a letter to road agreement contractors, including Rieth-Riley, stating that, on August 8, the trustees directed it to return fund contributions submitted after June 1. Any such contributions were returned to the contractor with the letter. The representative stated the trustees "determined that there is no legal basis for accepting contributions without a written agreement between your Company and IUOE Local 324." Stockwell sent a second letter to Pearce on August 10, in which he reiterated that MITA had terminated the road agreement, as well as that the Union had accepted the termination, timely terminated the road agreement with each individual contractor, and had withdrawn from multiemployer bargaining. He further stated the Union had not negotiated or reached out to the POA contractors under the terminated road agreement.⁶³

On August 16, Nystrom posted a third time on the contractors' website, informing them that the Union had "moved the goal posts" by returning all of their fund contributions even though they had rescinded their POAs with MITA. Nystrom suggested the contractors reverse course and again start paying vacation fund contributions directly to employees.⁶⁴

convinced at the August 8 meeting that the Union and MITA were not going to enter into a new collective-bargaining agreement and, without one, the funds could not legally accept contractor contributions. (Tr. 1879-1881.) Woodbeck testified consistently concerning his rationale and appeared sincere when doing so.

Given these facts, I conclude that the fund trustees were not acting as agents of the Union when they voted on the various proposals involving fringe benefit fund contributions for MITA POA contractors. In that regard, the factors to consider are whether the trustees' actions were directed by union officials; their actions were undertaken in their capacities as union officials rather than trustees; and a collective-bargaining agreement removed the discretion to administer the funds solely for the benefit of employees. *Service Employees Local 1-J (Shor. Co.)*, 273 NLRB 929, 932 (1984). The record evidence is insufficient to establish that Stockwell directed the trustees' votes or the trustees were acting as union officials during their three special fund meetings. The expired road agreement also contained no provision allowing the funds to be administered for anything but the benefit of employees.

⁶² GC Exhs. 60, 68; C. Exh. 54.

⁶³ GC Exh. 26.

⁶⁴ GC Exh. 69; Tr. 1469. Nystrom's comment that Stockwell "changed the goalposts" by claiming after the POA rescissions that the funds still could not accept contributions missed the mark. The evidence establishes that the funds accepted contributions from non-POA contractors because the Union was negotiating with them for a successor contract. Moreover, Stockwell's position in his role as trustee from the first meeting in June 2018 on was that MITA terminated the contract, the Union accepted the termination and withdrew from multiemployer bargaining, and the funds could not accept contributions from MITA POA contractors because no contract was in place.

From August 8 to 22, Stockwell and Johnston sent numerous emails to each other bickering about what had occurred and trying to set up a future meeting. Stockwell said he believed MITA pulled the POAs because it thought the funds then would accept contributions if MITA was not the contractors' bargaining representative. Stockwell then opined that MITA failed to see that the fringe funds could not accept contributions because MITA had terminated the collective-bargaining agreement. He also stated that the Union had never bargained with MITA. Initially, Stockwell and Johnston both were willing to sit down with each other "to have a coffee" or "talk about a path forward," but not to negotiate. At one point, the two agreed to meet on August 22. However, Stockwell cancelled that meeting, because of "MITA's recent move and filing a lawsuit" against the Union.⁶⁵ Stockwell also refused Johnston's repeated requests thereafter to reconsider his decision to not meet with Johnston and Stover, citing concern that he would be setting himself up for another MITA lawsuit if he did so. At one point, Johnston assured Stockwell that MITA would not be involved in the new contract negotiations. Nonetheless, the two did not meet on August 22. That evening, Johnston asked Stockwell if he was available to meet on either of the next two days with Johnston, Stover, and Rick Becker, the president of Michigan Paving, a company which did not have a POA with MITA. Stockwell responded, "You sir can hug my nuts" and told Johnston he and MITA had severed their relationship with the Union and needed to figure out how to fix it. On August 23, Johnston responded and again expressed a desire to meet, acknowledging the meeting "is not a negotiation but to come to an understanding how we go forward together." Johnston then identified 11 companies that wanted to form a new contractor association without MITA's involvement. He said the contractors wanted to discuss with Stockwell "how we set up a union contractor association for purposes of negotiating [a] multiemployer bargaining agreement for road construction." Most of those companies had been a part of the MITA LRD committee, including Rieth-Riley. Stockwell responded the same day, telling Johnston to "[h]old on to that list and call me back in three years."⁶⁶

From August 9 to 28 when contractors did not have a POA with MITA, none of those contractors, including Rieth-Riley, requested to the Union that it engage in contract negotiations on an individual basis, either directly with the contractor or with MITA as its bargaining representative. As a result, no contract negotiations took place in that time period between the Union and any individual road agreement contractor which had rescinded the POA.⁶⁷

⁶⁵ Certain employees represented by the Union, including one who worked for Rieth-Riley, filed a lawsuit on August 2 against the trustees of the funds who voted not to accept contributions from the road agreement contractors following the contract expiration. The lawsuit alleged those trustees breached their fiduciary duties under ERISA. The attorney who filed the lawsuit on behalf of the employees previously represented MITA and MITA paid the attorney to represent the employees in the lawsuit. (Tr. 247–251.)

⁶⁶ C. Exhs. 51, 52, 55–58, 60–75; Tr. 139.

⁶⁷ I likewise do not credit Nystrom's testimony that he did not think the all-for-one agreement prohibited individual contractors from bargaining with the Union. (Tr. 1464–1465.) The plain language of the all-for-one agreement unquestionably prohibited signatory contractors from bargaining individually with the Union. The agreement was in effect for all the signatory contractors in August

IX. THE CONDUCT OF UNION REPRESENTATIVES AT AN AJAX PAVING JOBSITE ON AUGUST 25

5 In the summer of 2018, Ajax Paving was contracted to perform a paving job on an interstate highway in the Detroit metropolitan area. The highway was completely closed in the section Ajax was to repave (the “jobsite”). Ajax also set up a nearby staging yard for its equipment. David Marshall is the vice president of asphalt operations and Timothy Hay is a project manager for Ajax. On the job, Ajax operated a morning shift starting between 6:30 a.m. and 7 a.m. and lasting between 10 and 12 hours. It also operated a night shift starting at 6 p.m. 10 lasting between 12 and 14 hours. For the morning shift, about 6 operators represented by the Union were scheduled to work. For the evening shift, that number rose to approximately 20 to 25 operators.⁶⁸

15 On August 25, all Ajax employees represented by the Union reported on time for work at the jobsite for the morning shift. Marshall and Hay also were on the jobsite. They observed roughly 6 to 12 picketers, including Stockwell and Salisbury, walking with signs. The picketers

2018. As noted, no contractor reached out to the Union during the POA rescission period asking to negotiate a contract individually with the Union. Moreover, Nystrom gave two nonresponsive answers during direct examination when asked to explain why he thought the all-for-one agreement did not prohibit individual bargaining. The first was: “The goal from the beginning was to get a contract. We had requested to get together with the Union from the beginning. The contractors obviously are in the business to construct roadways across the state and their goal was to get a contract with this union and so from the beginning, that was the goal, to get a contract.” The second was: “You know, as the summer wore on, this was very difficult, the labor dispute and the contractors knew throughout the conversation that everyone’s goal was to get a contract. So in the end, the contractors did end up going off on their own and negotiated a separate agreement away from MITA and ultimately, this all-for-one agreement began to water down, if you will, over the course of the summer.” The all-for-one agreement watered down only after the then governor of Michigan intervened and the Union and contractors agreed to end the lockout and negotiate individually going forward. I find that the MITA POA contractors rescinded their POAs in August 2018 solely for the purpose of getting the funds to finally accept their contributions and did not pursue individual bargaining due to the all-for-one agreement.

I also note that Nystrom testified that, in the past, MITA had “worked on a variety” of collective-bargaining agreements which were negotiated on an independent basis. (Tr. 1406–1407.) Although identifying certain contractors as examples, no specifics were provided. Then when pressed on cross examination, Nystrom conceded that the examples included situations where MITA handled an introduction or reviewed a proposed contract, but did not meet directly with the Union to negotiate. (Tr. 1961–1969.) The one example where MITA did meet with the Union for an individual contractor resulted in a multiemployer agreement with MITA. Again, this testimony appeared to be exaggerated and designed to conform to Rieth-Riley’s legal theory. In any event, nothing in the record establishes that the Union, including Stockwell, was aware that MITA previously negotiated for individual contractors.

Finally, Rose testified in response to a leading question that Rieth-Riley was willing to negotiate individually with the Union, despite Rieth-Riley being signatory to the all-for-one agreement prohibiting such bargaining. (Tr. 1553.) But Rose never reached out to Stockwell to pursue that individual bargaining. Thus, I do not credit that testimony.

⁶⁸ Tr. 555–557, 610, 620–622.

walked along the shoulder of the closed highway. Their signs stated, "Operating Engineers Local 324" and "No contract with Lois Kay" or "No contract with Elmers." Lois Kay and Elmers were separate, nonunion companies performing milling work on the job.⁶⁹

5 When Hay subsequently went to the staging yard, he observed a half dozen picketers there walking in a tight group back and forth at the entrance carrying the Elmers signs. Hay pulled up to within 10 feet of the entrance, but the picketers did not stop their activity. He stayed there for a minute and decided not to attempt to enter, because he did not want to run into anybody. An unidentified individual yelled at Hay "good luck working today without any
10 equipment." Hay also observed Shawn Doris, an employee of Collins Heavy Haul, parked on the shoulder near the staging yard and standing outside his truck. Doris was supposed to deliver equipment to Ajax that day. Hay asked Doris what was going on. Doris responded that he did not feel comfortable dropping off the equipment on his truck at that time.⁷⁰ Hay told Doris to sit tight, then turned around and went back to the jobsite. When Hay got there, the half
15 dozen operators represented by the Union were working and the picketers still were present.⁷¹

 Later that morning, Marshall drove back to the staging yard with Hay as a passenger. Picketers again were walking back and forth at the entrance to the yard. Rather than risk a confrontation, Marshall declined to try and proceed in. They waited a few minutes, then turned
20 around and left. About 15 to 20 minutes later, Marshall returned to the staging yard and was able to access it then and multiple times thereafter. During his returns, the picketers still were present, but not in front of the entrance. Hay likewise returned to the staging yard just before noon and was able to enter. Doris eventually delivered his equipment as well. The Elmers and Lois Kay contractors' employees also were able to access the staging yard without incident.⁷²

25 Sometime between 11 a.m. and noon, the picketers left the jobsite and staging yard. Marshall got the paving equipment moved from the staging yard to the jobsite, approximately 100 yards away from where the work was to be done.⁷³

⁶⁹ Tr. 558–562, 610, 623–632; C. Exhs. 80 (pp. 2, 3, 4), 82.

⁷⁰ Over the union's objection, I admit the testimony regarding why Doris did not make his delivery pursuant to the FRE 803(3) state of mind exception to the hearsay rule. (Tr. 567–568, 570–571.) See *International Business Systems*, 258 NLRB 181 fn. 6 (1981).

⁷¹ Tr. 561–570, 576–577.

⁷² Tr. 578–579, 606, 610, 628–631. I do not credit Hay's conclusory testimony that he observed picketers that morning sometimes letting vehicles through and sometimes not. He offered no specifics and, as described in the next footnote, otherwise was not a reliable witness.

⁷³ Tr. 627, 633. Both Marshall and Hay testified at the hearing. Where both individuals testified about the same events and where conflicts exist, I rely solely on Marshall's reliable testimony. Hay's testimony in this regard was inconsistent. (Tr. 581–582.) More critically, Hay had almost no recall of the August 25 events and frequently needed his memory refreshed with his affidavit. By the end of his testimony, he essentially was reading his affidavit into the record. (Tr. 570–583.)

That afternoon, all of the Union's operators showed up to work for the night shift and arrived at the jobsite at 4:30 p.m. This matched their typical arrival time of about 1 to 2 hours before the 6 p.m. shift start time. Other Ajax employees likewise were onsite. In addition, employees from a street sweeping company also arrived at that time to clean the highway before the paving work could begin. Finally, a dozen picketers likewise returned, locating themselves between the paving equipment that was parked on the closed roadway and the jobsite 100 yards away. They walked back and forth across the closed freeway holding signs that said, "No contract Ajax." Upon seeing them, Marshall told the operators and the street sweepers to put things on hold and let him get the situation straightened out. Hay also spoke to Johnston, Ajax's president, who instructed him that he could not tell the operators they had to work. The street sweeping employees did not start their work. Both Marshall and Hay saw picketers, including Stockwell, speaking to the operators and street sweepers. When the operators' shift started, they would not move the equipment. When Hay asked one of the operators why he was not working, the operator told him they did not feel comfortable crossing the picket line; another operator told Marshall he was afraid to keep working because one of the picketers jumped in front of his machine.⁷⁴ An engineer from the Michigan Department of Transportation arrived at the jobsite and questioned Hay if they were going to work. Hay advised him of the situation and that they were at a standstill. Thereafter, state police likewise came on the jobsite and spoke with the engineer and union representatives. Following that visit, the union representatives left the jobsite. When Stockwell did so, he told Marshall and Hay "say hi to Mark Johnston and tell him to hug his nuts and fuck himself."⁷⁵ He added that they should tell Johnston this was strike one and he would remember this. Stockwell also gave Marshall the middle finger, which made Marshall laugh. The start of the overall work that night was delayed roughly 2 hours, while the operators work was delayed for less than an hour. The union's operators worked and were paid for the entire day. All of the Ajax employees were able to work a full day despite the delay because their work shifts fell into a range of hours, rather than being a fixed schedule.⁷⁶

X. MITA OBTAINS NEW POAS FROM CONTRACTORS AND INITIATES A LOCKOUT

On August 28, three days after the Union's picketing, MITA held an emergency meeting of the full MITA LRD committee with 50 representatives of road agreement contractors in attendance. The representatives discussed their all-for-one bargaining agreement from January 2018. They also discussed supporting each other against whipsaw strike actions to prevent the

⁷⁴ Again, Hay's testimony concerning what the operators told him is admitted pursuant to the 803(3) state of mind exception, but not to prove the truth of the matters asserted, i.e. that a picketer jumped in front of an operator's machine. The rule excludes statements of memory or belief to prove the fact remembered or believed.

⁷⁵ Marshall testified that Stockwell's comments were typical for the construction industry and that he hears it every day. (Tr. 651.) Hay concurred, testifying that swearing is a daily occurrence in the industry. (Tr. 598.)

⁷⁶ Tr. 579-583, 601-605, 611-616; 633-641, 652-656, 660-661; C. Exh. 80 (pp. 9-13), 84. Hay heard someone say to employees that they got their wish and could go to work, but again could not identify the individual who said it. (Tr. 583, 601.)

Union from playing divide and conquer. A representative from Grand River Construction discussed what happened with the Union and AGC in 2016. Ultimately, the full committee approved the lockout of employees beginning on September 4. MITA solicited and obtained new POAs from the 50 contractors again designating MITA as their bargaining representative with the Union. Rieth-Riley and Ajax were among the contractors that executed new POAs.⁷⁷

On August 29, Nystrom sent a letter to Stockwell. He accused Stockwell of blocking fund contributions for employees and refusing to accept contributions, even after the individual contractors all rescinded their POAs with MITA. He also accused Stockwell of refusing to negotiate with individual contractors who were MITA members, again even after the individual contractors all rescinded their POAs with MITA. Nystrom wrote that it appeared the union's objections to MITA were a pretext to avoid bargaining and accepting fund contributions. Then Nystrom stated:

Knowing your true intentions, it is time to move on. Because of your actions, the MITA contractors have now chosen to re-sign MITA powers of attorney. A list of those companies is attached. Effective today, MITA is once again the designated collective bargaining representative for these road contractors.

The first order of business is that Operating Engineers, Local 324 initiated a strike against Ajax Paving Inc. on Saturday, August 25, 2018. Your strike action, and other related activities, has resulted in the initiation of a defensive lockout in response to the union strike activity. This defensive lockout is scheduled to start on Tuesday, September 4, 2018 with the shift beginning at 7:00 am and will apply to the work sites across the state. The lockout will end when the union ratifies the statewide road agreement with MITA on the terms set forth in the attached proposal.

Nystrom attached a draft letter to employees announcing the lockout, which likewise stated the lockout would end when the Union ratified a statewide labor contract. He also attached that

⁷⁷ Tr. 211, 1556, 1567–1570, 1623–1625; GC Exhs. 61, 70–71. I correct the transcript at p. 1624, ln. 9 to read "whipsaw" instead of "wood straw." At the time of the decision to lock out employees, Nystrom had received reports from contractors throughout the summer after the road agreement expired concerning the Union's conduct discussed above. (Tr. 1472–1482; C. Exh. 202.) The reports included that the Union had not provided additional operating engineers when requested by MITA-represented contractors; not allowed operating engineers from out of state to work in Michigan for MITA-represented contractors and threatened them with fines for doing so; set up picket lines at MITA-represented contractors' jobs sites which union members would not cross; and asked road agreement contractors to sign the union's previously negotiated collective-bargaining agreement with AGC. I have not relied on any of these reports, based upon Nystrom's hearsay testimony, to establish the truth of the matters asserted. Again, I allowed the testimony only to show Nystrom's state of mind.

proposed statewide labor contract—between MITA and the Union. The contract contained the same wage increases that MITA proposed back in May.⁷⁸

On August 29, Stockwell responded. He wrote to Nystrom that the Union was not obligated to bargain with any employers with whom it had an 8(f) bargaining relationship or to engage in any bargaining on a multiemployer basis. Stockwell denied the Union had engaged in any strike action, saying its conduct was “permissible informational picketing.” He also denied that any labor dispute existed. Stockwell ended by saying that, if employers refused to allow employees to work on September 4, they effectively would be laying them off.⁷⁹

On August 29, MITA notified the road agreement contractors, including Rieth-Riley, of the lockout. The notice stated that the purpose of the lockout was to “achieve a new labor contract with the union.” It went on to say that, in support of the industry bargaining position and to protect against whipsaw strikes, each contractor that signed on to the all-for-one agreement was expected to lock out IUOE Local 324 employees working under the road agreement. Finally, the notice again stated that the lockout would end once the Union ratified MITA’s contract proposal.⁸⁰

On August 31, MITA informed Rieth-Riley that several contractors had received a deficiency notice from the Michigan Department of Transportation, which MITA suspected was related to the refusal of the funds to accept contributions. The communication described several potential methods for contractors to pay the contributions and comply with the state’s prevailing wage law. On that same date, Rieth-Riley informed its IUOE Local 324 employees of the lockout utilizing a template MITA provided.⁸¹

On September 4, Rieth-Riley locked out approximately 129 employees represented by IUOE Local 324. Some 50 other MITA POA contractors did the same. The lockout was

⁷⁸ GC Exhs. 28, 74; Tr. 217–218. I likewise do not credit Nystrom’s self-serving testimony, given in response to leading questions, that he was open to a union counterproposal that the contract would be on an individual contractor basis rather than on a multiemployer one. (Tr. 1483–1484.) Again, he did not include this alleged openness in any contemporaneous communication with the Union. Instead, he offered a complete collective-bargaining agreement between MITA and the Union, despite the Union having provided him with the May 2 letter withdrawing from multiemployer bargaining. His demeanor when providing this testimony was entirely unconvincing. Moreover, the testimony is belied by the discussion of the all-for-one agreement during the MITA LRD meeting on August 28. It is also belied by MITA’s instruction to contractors in the August 29 and 30 letters that any contractor which signed the all-for-one agreement was expected to lock out its employees. I likewise do not credit Rose’s similar testimony that Rieth-Riley did not care if bargaining was on a multiemployer or individual contractor basis. (Tr. 1570–1572.) Rieth-Riley never communicated this information to the Union during the August 2018 period when it had rescinded its POA with MITA. Rieth-Riley also never made a request to the Union to bargain individually.

⁷⁹ GC Exh. 29.

⁸⁰ GC Exhs. 49, 51, 72.

⁸¹ GC Exhs. 30, 73.

estimated to affect a total of 2500 employees, including operating engineers and other trades that could not work due to the operators' absence from construction sites.⁸²

5 On September 9, MITA posted on its website an update on the lockout, which stated: "In its lockout notice to OE 324, MITA informed the union that the lockout will end when the union ratifies the industry-proposed contract. . . and also notified them that the industry is available for talks at any time."⁸³

10 On September 14, Nystrom was quoted in a newspaper article on the lockout that the road construction industry was concerned the union's tactics could spread nationwide. It was further reported that he then referenced the union's attempt to negotiate separate agreements with individual contractors rather than a multiemployer collective-bargaining agreement. Finally, it was reported that Nystrom again indicated the lockout would end when the union accepted and ratified the industry proposed contract.⁸⁴

15 On September 20, MITA issued a press release in which Nystrom reiterated "MITA member companies are more unified than ever, and I will say it again: This defensive lockout will end as soon as the union ratifies the industry-proposed contract."⁸⁵

20 At some point during the lockout, both MITA and the Union met with Rick Snyder, then the governor of Michigan, following a request from Snyder's office. They negotiated an end to the lockout, ultimately agreeing on September 25 that the operators would return to work and complete as many jobs as possible before the winter. The two sides also agreed that, once the construction season ended, the Union would negotiate with individual contractors for successor
25 collective-bargaining agreements using federal mediators.⁸⁶

XI. THE DISCOVERY OF A SECTION 9(A) BARGAINING RELATIONSHIP BETWEEN RIETH-RILEY AND THE UNION AND RIETH-RILEY'S CLAW BACK OF VACATION FUND PAY FROM EMPLOYEES

30 At some time in August prior to the lockout beginning, Rose learned that Rieth-Riley had a Section 9(a), not 8(f), bargaining relationship with the Union. The company found a recognition agreement from the early 1990s. The agreement, executed by representatives from Rieth-Riley and the Union on November 2, 1993, set forth that Rieth-Riley recognized the Union as the exclusive collective-bargaining representatives of all operating engineer employees
35 within the State of Michigan. In addition, the agreement stated:

⁸² GC Exhs. 31-32; Tr. 261-262, 1485.

⁸³ GC Exhs. 28(d) and 81.

⁸⁴ GC Exh. 82. Nystrom testified that he could not recall his interview with the reporter who wrote the story, but that the story did not contain any information that was inconsistent with MITA's position at the time. (Tr. 1934-1938, 1972-1974.)

⁸⁵ GC Exh. 83. Nystrom again testified that nothing in the post was inconsistent with MITA's position at the time. (Tr. 1974.)

⁸⁶ Tr. 269-270, 310, 1485.

The Employer on or about the date of this Agreement, has been shown written evidence that a majority of its employees performing building construction work, underground construction work, and/or heavy, highway and airport construction work, within the jurisdiction of the Union in the State of Michigan, have designated the Union as their exclusive representative for the purposes of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment in accord with Section 9(a) of the National Labor Relations Act.

Rose informed Nystrom of the discovery prior to the lockout. Stockwell learned of Rieth-Riley's 9(a) status during the lockout in September.⁸⁷

On October 3, Pearce, the funds' counsel, advised Stockwell, Nystrom, and the other trustees that the funds had learned of the Section 9(a) relationship between the Union and Rieth-Riley. She also said the funds recommended that fringe benefit contributions from Rieth-Riley be accepted and credited, retroactive to the June 1 termination date of the road agreement.⁸⁸

On October 11, Rose sent Stockwell a letter advising that Rieth-Riley would resume making all fund contributions for its operating engineers. He noted that the company had paid all vacation fund contributions from June to September directly to employees, rather than to the fund. To address the fund contribution shortfall, Rose proposed a claw back pursuant to which Rieth-Riley would deduct the required contributions from employees' paychecks and pay the funds no later than December 2018, as called for in the expired road agreement. Rose also proposed the deductions would begin during the first full payroll period after October 15 and would not be greater than 15 percent of an employee's gross wages each pay period. In the alternative, Rose said Rieth-Riley was amenable to working out an arrangement with the Union and the funds to allow employees to retain the vacation fund money they had been paid and then give the company credit from the funds for the direct payments to employees. Rose closed the letter by saying Rieth-Riley planned on finalizing its plan on October 15. He asked Stockwell to respond before then if the Union wished to discuss the matter.⁸⁹

On that same date, Rose sent a second letter to Stockwell noting the Section 9(a) relationship between Rieth-Riley and the Union and requesting bargaining dates. This was the first communication from Rieth-Riley to the Union concerning bargaining. Rose went on to say that Rieth-Riley "intends to engage in coordinated bargaining with other employers." He

⁸⁷ Tr. 188–189, 214–215, 242–244, 252–258, 343, 976, 1597, 1602, 1608–1611, 1626; GC Exh. 3. Both Nystrom and Rose were somewhat evasive about the exact timing of when they learned of the Sec. 9(a) relationship between Rieth-Riley and the Union.

⁸⁸ GC Exh. 34.

⁸⁹ GC Exhs. 35 and 2, contract p. 28, Art. 5, Sec. 4(c); Tr. 914–915, 1578–1581.

named 12 other contractor representatives who would participate. Seven of the 12 representatives previously were part of the eight-member MITA LRD bargaining committee. Rose added that each employer was free to make its own bargaining decisions and that none of the other individuals would speak on Rieth-Riley's behalf. Finally, he said that any collective-
 5 bargaining agreement reached by the Union with Rieth-Riley was not contingent on agreement with the other employers.⁹⁰

On October 15, Stockwell responded to both letters. He began by stating the Union was not interested in coordinated bargaining, which Stockwell erroneously thought was equivalent
 10 to multiemployer bargaining. Stockwell did say the Union would bargain individually with Rieth-Riley. He said the federal mediator would contact Rieth-Riley for negotiation dates. Regarding the fund contributions, Stockwell said that Rieth-Riley needed to make all the fringe funds whole immediately. He also stated, "if any deductions are taken from the employee's pay that are in violation of Federal and/or State law and/or the contract, the same will be
 15 pursued by all means permitted under the law." Rose responded via letter the same day, expressing confusion about Stockwell's comment on the fund contributions. He wrote that it appeared the Union was rejecting his offer to bargain over the vacation fund payroll deduction plan. He asked Stockwell to contact him by close of business on October 17, if his interpretation was incorrect. Via letter dated October 16, Stockwell informed Rose that "we did not
 20 understand your letter regarding the vacation fund to be a request to negotiate that matter." He told Rose that the Union already stated its position regarding payroll deductions and the fund contributions, but Rose was free to bring up the subject in contract negotiations.⁹¹

On October 18, Rieth-Riley notified IUOE Local 324 employees that it was implementing
 25 payroll deductions to repay the vacation fund contributions from June through September. In the notification, the company described the October 11 proposal it made to the Union, then asserted that Stockwell rejected the proposal twice thereafter. The company stated it was implementing the deduction program as a result of those rejections. On October 26, Rose advised Stockwell that Rieth-Riley implemented the vacation fund deduction program.
 30 Stockwell responded on October 29, telling Rose again that the payroll deductions violated federal labor and state wage and hour law, as well as that the Union would pursue the matter.⁹²

At a meeting on November 1, the fund trustees voted to accept employer contributions from the contractors, including Rieth-Riley, who were discovered to have a 9(a) bargaining
 35 relationship with the Union. The funds sought those contributions retroactive to June 1.⁹³

⁹⁰ GC Exh. 36; Tr. 304–306. Rose conceded that Rieth-Riley did not make a request to bargain with the Union for a successor contract before this. (Tr. 1616.)

⁹¹ GC Exhs. 37–39; Tr. 915–918. I credit Stockwell's testimony, which appeared reliable, that he initially misunderstood Rose's reference to "coordinated bargaining" to mean multiemployer bargaining. Stockwell also made the comment in his letter about payroll deductions violating the law based upon his understanding that such deductions only could be made if an employee authorized them. (Tr. 307.)

⁹² GC Exh. 40, 42–43.

⁹³ C. Exh. 163; Tr. 926–928.

On November 20, the Union and Rieth-Riley held their first bargaining session for a successor contract. The session was conducted on a coordinated bargaining basis, with other contractors there to observe. After two coordinated sessions, bargaining continued on an individual basis between Rieth-Riley and the Union. MITA was not involved in any of the negotiations. At no point from January 9 to November 20 did Rieth-Riley rescind the all-for-one agreement it signed with MITA.⁹⁴

XII. THE UNION'S SUBSEQUENT BARGAINING ON MULTIEMPLOYER AND INDIVIDUAL BASES

In November, Johnston, Ajax's president, began informal discussions with representatives of four other unionized contractors about forming what eventually would become the Michigan Union Contractors Group (MUCG) the following April. Rieth-Riley was not one of the contractors. The initial group consisted of certain unionized contractors who wanted to bargain with the Union on a multiemployer basis. When Johnston first raised the idea with Stockwell around this same time, Stockwell said he wanted to bargain with individual contractors, as he had told Johnston throughout 2018. Johnston rejected that idea and said the contractor group wanted to stay together. However, shortly thereafter, Stockwell agreed to bargain on a multiemployer basis with that group.⁹⁵

On April 15, 2019, the Union and MUCG executed their airport agreement, effective from April 1, 2019, through May 31, 2024. More than 60 individual contractors signed onto the agreement between April 24, 2019, and September 30, 2019. An additional 26 contractors signed POAs with MUCG making MUCG their bargaining representative. Thus, those contractors likewise were bound to the agreement. Some of the contractors bound to the MUCG agreement had representatives on the MITA LRD in 2018.⁹⁶

⁹⁴ Tr. 1512, 1576, 1605–1606.

⁹⁵ Tr. 961–963, 1041–1042, 1047–1049. I credit Stockwell's testimony that he agreed to bargain on a multiemployer basis with the contractor group which became MUCG because he was "worn out" from the events preceding his agreement to do so. Stockwell exhibited a trustworthy demeanor when testifying repeatedly that that he wanted to bargain with individual contractors because they did the work. His initial response to Johnston's request to multiemployer bargain was exactly that. Only later did he agree to multiemployer bargain with MUCG. His demeanor when he testified to being worn out likewise appeared reliable. Moreover, the events in the dense recitation of facts to this point understandably could wear anyone out. Beyond being worn out, Stockwell's willingness to multiemployer bargain with MUCG undoubtedly had something to do with the association having all union contractors, as opposed to MITA's membership being heavily nonunion. (See C. Exh. 139, p. 6.)

⁹⁶ C. Exhs. 103, 142; Tr. 955–961.

XIII. RIETH-RILEY'S WAGE INCREASE TO ITS OPERATING ENGINEERS IN 2020

Effective June 1, 2020, Rieth-Riley again raised the hourly wage rate of its operating engineers, this time by \$1 per hour.⁹⁷ As in 2018, Rieth-Riley implemented the increase without providing the Union with notice and an opportunity to bargain. When Rieth-Riley provided the increase, the company and Union still were negotiating for an individual successor contract, wage increases were an open issue, and no overall agreement had been reached. Again, Rieth-Riley implemented the 2020 wage increase to comply with the Davis-Bacon Act.⁹⁸

XIV. THE UNION'S STRIKE AGAINST RIETH-RILEY⁹⁹

On May 29, 2019, the General Counsel issued the complaint against Rieth-Riley in Case 07-CA-234085, based upon the unfair labor practice charge filed by the Union. As previously noted, the complaint originally alleged that Rieth-Riley unlawfully locked out its employees in September 2018; unilaterally granted a wage increase to its employees in July 2018; unlawfully insisted that the Union engage in multiemployer bargaining; and unilaterally deducted monies from unit employees' pay related to vacation fund contributions.

⁹⁷ As in 2018, this increase resulted in a corresponding increase to the vacation fund contribution of \$0.15 per hour. In addition, effective June 1, 2019 and June 1, 2020, Rieth-Riley also unilaterally increased its contribution to the pension fund by \$0.50 per hour, in accordance with the aforementioned rehabilitation plan. (Tr. 2370; C. Exhs. 212, 214.)

⁹⁸ Tr. 2391, 2400; C. Exh. 214, GC Exh 2., contract p. 28, Art. 5, Sec. 4(a). The General Counsel's original complaint alleged only that Rieth-Riley unilaterally provided its operating engineers with a wage increase on July 23, 2018, in violation of Sec. 8(a)(5) and (1). On the 10th day of hearing in this case, Rieth-Riley's CEO Rose testified that the 2018 increase was given in line with MITA's May 2018 contract proposal to the Union and also because it was consistent with past practice. (Tr. 1631-1632.) Rose also testified that it was his understanding Rieth-Riley gave similar wage increases to its operating engineers in June 2019 and June 2020. Shortly thereafter, the General Counsel moved to amend the complaint and allege the two subsequent wage increases also were unlawful unilateral changes. On April 9, 2021, after full briefing, I granted the General Counsel's motion. Then on the 15th day of hearing, Rieth-Riley's Regional Vice President Loney contradicted Rose and testified that Rieth-Riley had not given its operating engineers a wage increase in 2019. I credit Loney's testimony in that regard. Loney is in charge of all the company's operations in Michigan and is responsible for ensuring that contractual wage rates are properly paid. (Tr. 2369.) Furthermore, Loney's testimony was corroborated by Katelyn Zonker, a payroll manager for Rieth-Riley, as well as payroll records. (Tr. 2414, 2422; C. Exhs. 208, 210, and 211.) Those two individuals had more direct knowledge of employees' pay than Rose did.

⁹⁹ At the same time as the unilateral wage increase complaint amendments, the General Counsel also moved to amend the complaint to include an allegation that the Union engaged in an unfair labor practice strike beginning about July 31, 2019, as a result of the alleged unlawful conduct by Rieth-Riley in Case 07-CA-234085. As a remedy, the General Counsel sought an open ended order requiring the reinstatement, upon application, of all qualified strikers and backpay. In my same April 9, 2021 order, I granted the General Counsel's motion. On April 21, 2021, Rieth-Riley filed with the Board a request for special permission to appeal my order granting the motion to amend as to the ULP strike. On June 22, 2021, the Board denied Rieth-Riley's request.

About 2 months later on July 25, 2019, the Union held a meeting with about 100 of its 180 members who worked as operating engineers for Rieth-Riley. Stockwell and Dombrow spoke at the meeting. Stockwell talked about the lockout, what had transpired between the Union and Rieth-Riley since the lockout, and the potential for an upcoming strike. He described the status of negotiations with all road contractors, then specifically about negotiations with Rieth-Riley. Stockwell also discussed unemployment benefits with the members and the Union's position that employees had been laid off, not locked out, and were entitled to those benefits. Finally, Stockwell told the members that a strike was a last resort. Dombrow principally discussed the General Counsel's complaint in Case 07-CA-234085, reading and talking about many of the allegations. He also told the members that the General Counsel's office had made a settlement offer to Rieth-Riley of \$1.8 million to resolve the complaint allegations, but Rieth-Riley rejected it. Like Stockwell, Dombrow touched on the lockout and the potential for an upcoming strike. Dombrow also told the members that a strike was a last resort and something to be avoided at all costs. He added that Rieth-Riley seemed completely uninterested in resolving the issues caused by the lockout. Multiple members spoke about their desire to go on strike. They also asked questions about the NLRB case, including how long it would take. They also inquired about unemployment benefits. At the end of the meeting, Stockwell told the attendees that the Union would let them know what it decided about a strike and would notify them the night before if they went on strike. No strike vote was taken by the members at the meeting.¹⁰⁰

At the time of the meeting, the negotiations for an individual successor road agreement between Rieth-Riley and the Union were ongoing. Subcontracting remained one of the sticking points to the parties reaching overall agreement. The Union's proposed subcontracting clause required contractors to subcontract work only to subcontractors who would comply with the rates, terms and conditions—and fringe benefit fund contributions—of the agreement. Contractors generally would not be liable for subcontractor violations. As discussed earlier, Rose and Rieth-Riley opposed this provision to the extent it required subcontractors to pay fund contributions. On July 29, 2019, Rieth-Riley provided the Union with a subcontracting counterproposal in which it would agree to the Union's language with respect to seven counties within the State of Michigan, but not for the remaining counties. The Union rejected the proposal. At that time, the other contract provisions which remained open in bargaining were profit sharing, a hiring hall, wages, jurisdiction, and fringe benefits.¹⁰¹

On either the same day or July 30, 2019, Stockwell decided that the Union should go on strike against Rieth-Riley. Stockwell decided to call a strike for a number of reasons. He wanted the members to get paid the \$1.8 million in lost wages and fund contributions from the lockout. He was concerned about the difficulties members were having in obtaining unemployment benefits for that time period. He was worried about the lack of progress in reaching a collective-bargaining agreement. And he was troubled by the company's vacation fund claw back. As to his authority to make the decision, the Union places responsibility in its

¹⁰⁰ Tr. 2447–2449, 2490, 2523–2529, 2541–2543, 2586–2590, 2598–2599; GC Exhs. 92, 94, 108.

¹⁰¹ Tr. 2558–2661; C. Exhs. 219, 223.

business manager to call a strike. Stockwell also relied upon a vote taken of all the operating engineers who worked for MITA POA contractors in the summer of 2018. That group included Rieth-Riley operating engineers. The vote authorized the Union to call a strike going forward. On July 30 at 4 p.m., Stockwell, via email, notified the Union's business representatives of his decision to go on an "unfair labor practice strike" against Rieth-Riley at midnight that night. Then at 9 p.m., the Union sent a text notification to the Rieth-Riley unit employees advising them they would be on an "unfair labor practice" strike at midnight.¹⁰²

On July 31, 2019, the Union went on strike against Rieth-Riley. Early that morning, the Union established picket lines at 13 Rieth-Riley asphalt plants throughout the State of Michigan. During its picketing, the Union utilized two signs at all of the facilities. The first said "Operating Engineers Local 324 ON STRIKE against Rieth-Riley Unfair Labor Practices." The second stated "Operating Engineers Local 324 NO CONTRACT against Rieth-Riley Unfair Labor Practices." That day, the Union posted an announcement of the strike against Rieth-Riley for "unfair labor practices" on its Facebook page. Stockwell was quoted in the post that "Our workers have negotiated in good faith and the National Labor Relations Board has offered Rieth-Riley a settlement to avoid a trial over unfair labor practice charges."¹⁰³

Within the first 3 months after initiation of the strike, the press published numerous articles about it. In most of the articles, including some containing quotes from union officials like Stockwell, the union's justifications for going on strike were reported as both the unfair labor practices that Rieth-Riley was alleged to have committed and the lack of progress in negotiations, in particular on subcontracting. The Union's communication director, Daniel McKernan, was responsible for communications with the press concerning the articles. In the same time period, the Union issued numerous press releases about the strike which McKernan drafted. The press releases set forth that both the unfair labor practices and the lack of a successor contract were the reasons for the strike. Beyond that, McKernan also wrote a speech to give at a fundraiser for striking employees of General Motors who were represented by the United Auto Workers (UAW) union. In the speech, McKernan wrote that one of the reasons the Union struck Rieth-Riley was due to its subcontracting of work to nonunion contractors. He also mentioned the lockout and the vacation fund claw back. Finally, he wrote that many other contractors already had signed a contract with the Union and, if Rieth-Riley got its desired subcontracting language, all of those contracts would get the same language. (McKernan did not end up giving the speech.) In that same vein, Stockwell posted an article on the Union's Facebook page on September 26, 2019, concerning the UAW strike at General Motors and stated the article might help "some understand why subcontracting . . . is so important to us."¹⁰⁴

On August 2, 2019, and September 23, 2019, the Union sent letters with Stockwell's signature to the international union requesting strike benefits for the striking Rieth-Riley

¹⁰² Tr. 2544–2546, 2549, 2561–2562, 2594–2595, 2599; GC Exhs. 105, 107.

¹⁰³ Tr. 2462–2471, 2529–2537, 2591–2593, 2614–2618; GC Exhs. 93, 96, 98, 99, 101, 110, 120, 132.

¹⁰⁴ Tr. 2445, 2502–2511, 2515–2518; C. Exhs. 225–229; GC Exhs. 90(b)-(e), 91(a)-(g).

employees. In the letters, Stockwell referenced the subcontracting language dispute as the explanation for the requests. He did not mention the unfair labor practices complaint.¹⁰⁵

In a September 4, 2019 letter to Rieth-Riley employees, Stockwell explained the Union's issue with subcontracting and a favored nations clause in the road agreements already entered in to by numerous other road agreement contractors. That clause meant that any agreement with Rieth-Riley to limit the union's subcontracting language to certain Michigan counties would apply to all the other road agreement contractors.¹⁰⁶

As of May 27, 2021, the last hearing day in this case, Rieth-Riley and the Union had not agreed to a successor contract and the Union's strike remained ongoing.

ANALYSIS

I. DID THE UNION PROPERLY WITHDRAW FROM MULTIEMPLOYER BARGAINING?

The General Counsel's complaint against Rieth-Riley in Case 07-CA-234085 presents a variety of legal issues, the principal one being the lawfulness of Rieth-Riley's lockout of its employees in September 2018. But the threshold issue from which the rest of the legal dominos fall is not contained in the complaint. That issue is whether the Union properly withdrew from multiemployer bargaining.

Multiemployer bargaining is consensual. Neither an employer nor a union can require the other party to bargain on a multiemployer basis. *Walnut Creek Honda*, 316 NLRB 139, 142 (1995). A party's withdrawal from multiemployer bargaining is effective only if it is timely and unequivocal. See, e.g., *Haas Electric, Inc.*, 334 NLRB 865, 866-867 (2001), enf. denied 299 F.3d 23 (1st Cir. 2001); *Retail Associates, Inc.*, 120 NLRB 388, 393 (1958). In order to be timely, a withdrawal requires adequate written notice given prior to the date set by the contract for modification or to the agreed-upon date to begin the multiemployer negotiations. *Retail Associates*, 120 NLRB at 395. Where actual bargaining negotiations based upon the existing multiemployer unit have begun, withdrawal from that multiemployer bargaining is permissible only upon the mutual consent of the parties absent unusual circumstances. *Ibid.* In order to be unequivocal, the withdrawal must be unambiguous and contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and an intent to bargain on an individual basis going forward. *District Council of Plasterers and Cement Masons of Northern California (Marina Concrete Co.)*, 312 NLRB 1103, 1105 (1993). If a party subsequently acts inconsistently with its stated intent to withdraw, such conduct nullifies the withdrawal. *Dependable Tile Co.*, 268 NLRB 1147, 1147 (1984), enf. in pertinent part 774 F.2d 1376, 1383-1384 (9th Cir. 1985).

¹⁰⁵ C. Exhs. 221, 222.

¹⁰⁶ C. Exh. 224.

Here, the Union sent a written notice to MITA on May 2, 2018 that it “hereby withdraw[s] from multiemployer bargaining with MITA” for the road agreement. That notice was timely because the Union and MITA had not agreed upon a date to begin multiemployer negotiations. Although Nystrom and Johnston asked Stockwell on February 19, April 11, and May 1 for dates to bargain a successor contract, Stockwell never responded. Thus, no negotiation dates were set and actual negotiations had not begun. The Union’s withdrawal also was unequivocal. The text of the written notice is unambiguous concerning the Union’s withdrawal from multiemployer bargaining in the unit represented by MITA. After sending the notice, union representatives repeatedly communicated to MITA, contractors, employees, and the funds its desire to negotiate individually with contractors and its rejection of multiemployer bargaining. The Union did not alter that stance prior to the lockout.

In defense to these allegations, Rieth-Riley first argues that the Union’s withdrawal from multiemployer bargaining was not timely, because it was not sent to MITA prior to the date set by the road agreement for modification. This is factually correct, but legally irrelevant. The road agreement’s termination provision required that any party intending to terminate or make changes to the agreement was required to provide notice at least 60 days prior to the end of the contract’s term. With a May 31, 2018 expiration date, such notice was due by April 1, 2018. The Union’s withdrawal from multiemployer bargaining was not sent until May 2, 2018. Nonetheless, the conditions the Board set in *Retail Associates* for a timely withdrawal from multiemployer bargaining were in the disjunctive. To timely withdraw, a party either had to provide notice prior to the date set for modification in the contract *or* the agreed upon date to begin multiemployer negotiations. Admittedly, the first condition was not met here.

However, and despite Rieth-Riley’s argument to the contrary, the second condition was met. The company contends that, at the time of the Union’s withdrawal letter, actual negotiations on a successor contract between the MITA LRD and the Union already had begun. I do not agree. The Union did meet with Rieth-Riley in May 2016 and twice with multiple contractor representatives in June 2016 and January 2017. For the latter two meetings, not all of the contractor representatives were part of the MITA LRD responsible for negotiating the road agreement. Nystrom also did not attend the meetings. At all of these meetings, the groups discussed the issues of subcontracting and a hiring hall. The Union previously raised the subcontracting issue back in 2014 with MITA. It raised the hiring hall issue in response to Michigan’s passage of a right-to-work law in 2012. None of the discussions at the meetings or written communications between the Union and contractor representatives ever indicated that the meetings were for the purpose of beginning negotiations for a successor road agreement. In fact, the opposite is true. Johnston specifically told Stockwell that he wanted to have a discussion “from the 10,000 foot viewpoint” and discuss their futures, not bargain a contract. In the final meeting in January 2017, the group discussed the need to start negotiations on a successor agreement, thereby indicating that bargaining had not yet begun. When Nystrom sent the contract termination letter to Stockwell on February 19, he also requested dates “for negotiations on a successor agreement,” not to continue negotiations which already had begun. The prior meetings all occurred well before Nystrom’s request for dates to bargain a new

agreement. Finally, the Union's submission of an existing hiring hall agreement to the groups, standing alone, establishes nothing more than that Stockwell wanted the contractors to sign onto the agreement. That could have been as a mid-term modification to the existing road agreement or as part of a successor contract. None of the communications establish which one it was. For all these reasons, the meetings did not constitute the start of actual negotiations for a successor road agreement, and the Union's withdrawal from multiemployer bargaining was timely. *Patterson-Stevens, Inc.*, 316 NLRB 1278, 1278 fn. 3, 1285–1286 (1995) (meeting between employer association and union to discuss union-proposed modifications to current contract, agreement to which was a pre-condition to begin early negotiations for successor contract, did not constitute negotiations for a new contract and did not render employer's subsequent withdrawal from association untimely); *Dependable Tile Co.*, 288 NLRB 710, 712, 714 (1988) (informal meeting between three members of employer association's negotiating committee and union negotiators to raise specific successor contract provisions in need of modification did not constitute formal negotiations and did not render subsequent withdrawal from multiemployer bargaining ineffective).

Rieth-Riley also argues that the Union did not clearly and unequivocally withdraw from multiemployer bargaining. On clarity, the company contends that the Union was refusing to bargain on a multiemployer basis solely with MITA, not withdrawing from multiemployer bargaining in any form, because Stockwell wrote "we hereby withdraw from multiemployer bargaining *with MITA*" for the road agreement. I find this argument to be splitting hairs. Prior to Stockwell sending his letter, the existing bargaining relationship was between the Union and MITA, the latter serving as the multiemployer bargaining representative for contractors who had POAs with MITA. Stockwell's statement is nothing more than a clear reflection of that fact. In any event, the Union was not required to withdraw from multiemployer bargaining in any form. It was required to clearly withdraw from multiemployer bargaining in the unit represented by MITA and Stockwell's letter did so.

On unequivocal withdrawal, Rieth-Riley similarly points to the fact that the Union subsequently negotiated a multiemployer agreement with MUCG. But the sequence of events leading to the MUCG agreement was not inconsistent with the Union's withdrawal from multiemployer bargaining in the unit represented by MITA. In November 2018, seven months after Stockwell's withdrawal letter, a handful of representatives from union contractors decided on their own to form MUCG. When Johnston first asked Stockwell to bargain with the group, Stockwell refused. He told Johnston, as he had consistently told numerous others before then, that he wanted to bargain on an individual basis with contractors. Ultimately, Stockwell reversed course and went forward with multiemployer bargaining with MUCG, having been worn down by the prior events in 2018 and being more amenable to an association made up of solely union contractors. The MUCG multiemployer unit was distinct from the one represented by MITA. Thus, Stockwell was not attempting to get the best of both worlds by withdrawing from multiemployer bargaining in the unit represented by MITA and subsequently continuing to negotiate in that same unit. With MUCG, he was multiemployer bargaining in an entirely different world. Cf. *Dependable Tile Co.*, 268 NLRB at 1147 (employer did not unequivocally

withdraw from multiemployer bargaining where it claimed to have withdrawn but then continued to participate in multiemployer negotiations *in the same multiemployer unit*). The Union never equivocated regarding its unwillingness to bargain in the multiemployer unit represented by MITA. It also was free to consent to multiemployer bargaining with MUCG in a different bargaining unit.

Accordingly, I conclude that the Union's withdrawal from multiemployer bargaining was valid.

II. DID RIETH-RILEY UNLAWFULLY LOCK OUT ITS MICHIGAN OPERATING ENGINEER EMPLOYEES IN SEPTEMBER 2018?

The General Counsel's complaint in Case 07-CA-234085 alleges that, from about September 4 to 27, 2018, Rieth-Riley insisted, as a condition of reaching any collective-bargaining agreement, that IUOE Local 324 agree to engage in multiemployer bargaining, a permissive subject of bargaining, by executing a multiemployer contract. The complaint further alleges that, during that same time period, Rieth-Riley locked out its operating engineer unit employees who were employed at various jobsites throughout the State of Michigan in furtherance of its unlawful bargaining objective. The complaint alleges this conduct violates Section 8(a)(5) and (1) of the Act.

The General Counsel asserts the following legal theory to support these allegations. Rieth-Riley and the Union had a Section 9(a) bargaining relationship going back to 1993. In February 2018, MITA terminated the road agreement and, in May 2018, the Union properly withdrew from multiemployer bargaining for that agreement. Given the 9(a) relationship, Rieth-Riley was required to maintain the status quo following the road agreement's expiration on May 31, 2018, until a successor agreement or impasse was reached in bargaining. When Rieth-Riley locked out its employees on September 4, 2018, it conditioned the end of the lockout upon the Union's execution of a multiemployer agreement with the MITA LRD. That condition was unlawful because Rieth-Riley's insistence upon multiemployer bargaining was a permissive subject of bargaining.

It is a violation of the statutory obligation to bargain in good faith for either an employer or union to insist to impasse on a permissive, or nonmandatory, subject of bargaining, i.e., a subject that does not concern the terms and conditions of employment in the bargaining unit to which the recognitional obligation extends. *Don Lee Distributor, Inc.*, 322 NLRB 470, 471 (1996) (citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958)). Change in the scope of a bargaining unit, including compelling a party to join or leave multiemployer bargaining, is a nonmandatory subject of bargaining. *Sheet Metal Workers' Intl. Assn., Local 104 (Ernest Ongaro & Sons)*, 323 NLRB 227, 231 (1997); *Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230, 238 (1973), *enfd.* 490 F.2d 1383 (6th Cir. 1974). If an employer locks out unit employees in support of a proposal to change unit scope, the lockout is unlawful. *Technocap LLC*, 368 NLRB No. 70, slip op. at 1 fn. 2, 12 (2019).

The starting point here to analyzing the lawfulness of the lockout is the all-for-one agreement. In that regard, the Board's decision in *Don Lee Distributor*, supra, is instructive. There, the respondents were six beer distributors who formerly were members of various multiemployer associations that had successive contracts with the union. Following their resignations from the associations, the group signed a "mutual aid pact" in which they agreed to numerous objectives for a collective-bargaining agreement. The pact required a majority vote of the six companies to change those objectives. It also subjected any company which breached the pact, including by negotiating directly with the union concerning the objectives, to a penalty fee of \$400,000 to each of the other companies. During bargaining with the union, the companies did not disclose their pact with one another. The Board concluded that, by entering the secret pact, the companies lost their freedom to make the ultimate decision as to provisions in its individual contract. By doing so, the companies were engaged in multiemployer bargaining. The employers' secret agreement to engage in such bargaining without the union's knowledge or consent violated Section 8(a)(5) and (1).

The all-for-one agreement here is strikingly similar to the unlawful mutual aid pact in *Don Lee*, but goes even further. By executing the agreement, Rieth-Riley explicitly committed itself to multiemployer bargaining (not just bargaining objectives) and ceded its bargaining authority to the MITA LRD. The agreement prohibited Rieth-Riley from bargaining individually with the Union and subjected the company to damages if it did so. The agreement obligated Rieth-Riley to report to MITA any attempt by the Union to negotiate individually with the company. It required Rieth-Riley to keep the existence of the agreement confidential. The agreement mandated that, in order for a multiemployer contract reached by MITA and the Union to be effective, a majority of the contractors had to ratify it. Finally, Rieth-Riley gave MITA the authority to decide that the company had to lock out its own employees. As a result, the all-for-one agreement bound Rieth-Riley to multiemployer bargaining, including at the initiation of the lockout on September 4, in a unit of all employees of road agreement contractors who had POAs with MITA. However, once the Union timely and unequivocally withdrew from multiemployer bargaining on May 2, Rieth-Riley could not insist that the Union bargain in that format and instead had to bargain on an individual or coordinated basis in a unit of Rieth-Riley operating engineers. By entering into the agreement, Rieth-Riley lost its freedom to bargain individually with the Union and retain the ultimate decision on what a contract would include.

MITA's and Rieth-Riley's conduct between the Union's withdrawal from multiemployer bargaining and the initiation of the lockout reflects adherence to the all-for-one agreement and insistence that the Union bargain on a multiemployer basis. After receiving notification from the Union that it had withdrawn from multiemployer bargaining, both MITA and Rieth-Riley flat out ignored it. Nystrom's immediate response in May 2018 was to send a multiemployer contract proposal to the Union. He also sent the Union a list of all contractors who signed POAs with MITA. He offered to extend the 2013–2018 multiemployer road agreement and the health care provisions therein. Although Nystrom informed the contractors of the Union's withdrawal

letter, all of his communications to contractors thereafter were framed as if the multiemployer bargaining relationship continued to exist. Regarding Rieth-Riley, at no time did the company ask to bargain with the Union individually, either directly or with MITA as its representative. This included the August 8-28, 2018 time period when Rieth-Riley had rescinded its POA with MITA. It also included the time period in August prior to the lockout after Rieth-Riley discovered it had a Section 9(a) bargaining relationship with the Union. In that same time period of POA rescissions, Nystrom also did not tell Stockwell that MITA would be representing individual contractors in contract negotiations going forward. Then, after the contractors re-signed POAs, MITA invoked its authority in the all-for-one agreement to lock out the contractors' employees, including those at Rieth-Riley. When Nystrom notified Stockwell of the planned lockout, he included a complete contract proposal between the MITA LRD and the Union. Nystrom told Stockwell the lockout would end when the Union signed that agreement. In subsequent communications with the contractors, MITA stated the purpose of the lockout was to achieve a new contract with the Union. He acknowledged the Union's "attempt" to negotiate separate agreements with individual contractors, rather than a multiemployer agreement. He said that the "industry" was available for talks at any time. And he reiterated numerous times that the lockout would end when the Union signed the multiemployer agreement. Those facts establish that the goal of the lockout was to force the Union to return to bargaining on a multiemployer basis, as required by the all-for-one agreement.

Because MITA and Rieth-Riley used the lockout as an offensive, not defensive, tactic to force the Union back into multiemployer bargaining and thereby change the scope of the bargaining unit, the lockout was unlawful. *Great Atlantic & Pacific Tea Co.*, 145 NLRB 361, 365 (1963) (employer lockout that was used to force a change from single to multiemployer bargaining to which the union had not consented was an unlawful offensive tactic); *Greensburg Coca Cola Bottling Co.*, 311 NLRB 1022, 1023-1024 (1993), rev'd. on other grounds 40 F.3d 669 (3rd Cir. 1994) (employer lockout in furtherance of bargaining proposal to exclude part-time employees from the bargaining unit was unlawful). See also *American Stores Packing Co.*, 158 NLRB 620, 623 (1966) (employer lockout used as coercive pressure to compel a union to agree to exclude certain mandatory subjects of bargaining from negotiations was unlawful).

To avoid this conclusion, Rieth-Riley advances numerous arguments that all lack merit. The principal one is that, following the Union's coercive conduct in the summer of 2018 culminating in its whipsaw strike at Ajax Paving on August 25, the lockout was lawfully initiated as a defense to further whipsaw strikes by the Union against other road agreement contractors. The U.S. Supreme Court has approved of such defensive lockouts. See *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957). However, the purpose of the lockout must be to preserve multiemployer bargaining from the disintegration threatened by whipsaw strikes. *Id.* at 97. Again, the Union here lawfully withdrew from multiemployer bargaining. Thus, the lockout could not preserve multiemployer bargaining which no longer existed.

Even if it could, the conduct MITA and Rieth-Riley relied upon to initiate the lockout was not a strike or otherwise unlawfully coercive. On August 25, the Union established a picket

line at a highway construction jobsite and staging yard where Ajax Paving and two nonunion contractors, Elmers and Lois Kay, were performing work. The picket signs all stated: “No contract” and one of the three contractors’ names. Assuming arguendo that such language establishes that the picketing had a recognitional or organizational object¹⁰⁷, the publicity proviso of Section 8(b)(7)(C) of the Act comes into play. In part, that proviso permits informational picketing for the purpose of truthfully advising the public that an employer does not have a contract with a labor organization, unless an effect of such picketing is to induce a work stoppage or interruption of deliveries. However, any work stoppage or interruption of deliveries will not render picketing unlawful. Rather, the actual impact of the work stoppage or interruption of deliveries on the picketed business must be ascertained. See *Retail Clerks Local 324 (Barker Bros.)*, 138 NLRB 478, 491 (1962). Here, the picketing occurred for only one day. During the morning picketing at the staging yard, one delivery was delayed by the picketing and no work stoppage occurred. The start of work on the evening shift was delayed for one to two hours because Marshall, Ajax’s representatives, directed the employees not to work upon seeing the picketers. Nonetheless, the operating engineers ended up working their full shift after the delay. This almost non-existent impact on the business of Ajax and the other contractors is insufficient to render the picketing unlawful. Ibid (over 12 weeks of picketing, three delivery stoppages, two work delays, and several delivery delays were insufficient to establish 8(b)(7)(C) violation); *Retail Clerks Local 1404 (Jay Jacobs Downtown, Inc.)*, 140 NLRB 1344, 1346–1347 (1963) (over 5 months of picketing, three refusals by employees to make deliveries or provide services did not render picketing unprotected). Rather, the Union’s conduct was informational picketing privileged by the 8(b)(7)(C) publicity proviso, not a strike against Ajax which permitted Rieth-Riley to lock out its employees.

What is apparent from the sequence of events is that MITA and the road contractors seized on the Union’s August 25 conduct and framed it as a strike to invoke their plan to lock out employees. A little over 2 weeks prior to that date, the fund trustees voted to reject any contributions from MITA POA contractors and return the contributions already submitted after June 1. MITA then had the contractors revoke their POAs, but doing so did not alter the funds’ stance as to the contributions. Johnston’s attempts, the last one on August 22, to get Stockwell to meet with a group of contractors were unsuccessful. As a result, MITA utilized the Union’s conduct on August 25 to invoke an economic weapon—the lockout—which could alter this course of events and get the Union back to the bargaining table on a multiemployer basis.

Rieth-Riley also relies on the Union’s conduct during the summer of 2018 following expiration of the road agreement to justify its lockout decision. On multiple occasions, the Union did refuse to provide operators or apprentices to contractors without a collective-bargaining agreement. It also blocked IUOE Local 139 operating engineers from working in Michigan. These tactics were lawful, not coercive, attempts to put pressure on the road contractors to accede to the Union’s bargaining demands in individual successor contract negotiations. *Allied Mechanical Services, Inc.*, 332 NLRB 1600, 1608 (2001); see also *NLRB v.*

¹⁰⁷ See *Teamsters Local 203 (Union Interiors)*, 298 NLRB 315, 323 (1990).

Insurance Agents' International Union, 361 U.S. 477, 489 (1960) ("The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."). Stockwell himself conveyed that message when speaking to IUOE Local 139 president McGowen about why he wanted that local's operators to remain in Wisconsin.

Finally, Rieth-Riley contends that the all-for-one agreement is rendered irrelevant by the Board's decision in *Iron Workers Local 625 (Construction Industry Bargaining Association of Hawaii)*, 211 NLRB 128 (1974). In that case, both the Ironworkers and Boilermakers historically bargained with construction employers either on an individual or multiemployer basis. Prior to negotiations on successor contracts in 1972, a number of employers designated a new association—the Construction Industry Bargaining Association of Hawaii (CIBA)—as their bargaining representative. CIBA's bylaws barred employer members from individually negotiating with the unions absent approval from CIBA. Following notification to the unions of this designation, the Ironworkers demanded continuation of association bargaining, but refused to negotiate with CIBA. The Boilermakers likewise refused to bargain with CIBA on a multiemployer basis. The Boilermakers also rejected CIBA's proposal that bargaining could proceed on an individual contractor basis and further suggestion that the individual negotiations be consolidated and conducted concurrently. The Board adopted the judge's finding that the unions' refusals to bargain with CIBA violated Section 8(b)(3) and 8(b)(1)(B). The judge found that the employers had the right to select whatever representative they chose and the union had a duty to bargain with that chosen representative. As to the Ironworkers, the judge noted that the union had the ability to withdraw from multiemployer bargaining prior to the commencement of bargaining, but did not do so. Thus, the Ironworkers insistence that multiemployer bargaining continue without CIBA representing the employers was unlawful. As to the Boilermakers, the judge found that the union may have demanded individual bargaining, but CIBA offered to act as the bargaining representative on an individual basis. The judge rejected the Boilermakers' argument that CIBA could not engage in individual bargaining, because its bylaws restricted it to multiemployer bargaining. In doing so, the judge relied upon the Board's decision in *Mayfair Industries, Inc.*, 126 NLRB 223, 224 fn. 1 (1960): "The Employer moved to dismiss the petition on the ground that the constitution of the Petitioner's International Union prohibits the Petitioner from representing the Employer's employees. We find no merit to this contention. *It is the Petitioner's willingness, rather than its constitutional ability to represent these employees which is the controlling factor.*" (Emphasis added.)

I find this case distinguishable from *Ironworkers Local 625*. Unlike the Ironworkers, the Union here properly withdrew from multiemployer bargaining. Unlike the Boilermakers, MITA never offered to bargain on an individual contractor basis with the Union like CIBA did. Unlike CIBA, MITA was not willing to represent any contractor, including Rieth-Riley, on an individual basis. Under these circumstances, the Union did not unlawfully refuse to bargain with MITA as a representative of an individual contractor. MITA could have been designated such on either an individual or coordinated basis and the Union would have had to bargain with it. *Teamsters Local 705*, 210 NLRB 210, 211 (1974) (union violated Section 8(b)(1)(B) and

8(b)(3) by refusing to bargain with a multiemployer association which had been designated as an individual gas dealer's bargaining representative). But no such designation ever occurred here and no contractor, including Rieth-Riley, requested that the Union bargain with MITA as its representative in either of these formats prior to the lockout.

5

As a result, I conclude that Rieth-Riley's lockout of its operating engineers from September 4 to 27, 2018, was for the purpose of forcing the Union to return to multiemployer bargaining, a permissive subject. Thus, the lockout violated Section 8(a)(5) and (1).

10

III. DID RIETH-RILEY GIVE OPERATING ENGINEER EMPLOYEES UNLAWFUL UNILATERAL WAGE INCREASES IN 2018, 2019, AND 2020?

The General Counsel's complaint in Case 07-CA-234085 alleges that Rieth-Riley violated Section 8(a)(5) and (1) of the Act by unilaterally granting wage increases to unit employees on July 23, 2018, June 1, 2019, and June 1, 2020. All of the alleged wage increases occurred following the expiration of the road agreement.

15

The law is well settled that an employer violates Section 8(a)(5) and (1) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative with prior notice and a meaningful opportunity to bargain over the changes. *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962). Following the expiration of a collective-bargaining agreement, an employer must maintain the status quo of all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op. at 3 (2019) (citing *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994), enf'd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999)). Changes to employees' wages are a mandatory subject of bargaining. *Columbia University*, 298 NLRB 941, 941 (1990).

20

25

On July 23, 2018, Rieth-Riley provided employees with a wage increase of \$2 per hour, with a corresponding \$0.30 per hour increase to the vacation fund contribution. It also increased the contribution to the pension fund by \$0.50 per hour. On June 1, 2019, Rieth-Riley granted a second \$0.50 per hour increase to the pension fund contribution. (The company did not raise wages in 2019.) On June 1, 2020, Rieth-Riley provided a second wage increase of \$1 per hour, with a corresponding \$0.15 per hour increase to the vacation fund contribution. It again provided a \$0.50 per hour increase to the pension fund contribution. The company admittedly did not advise the Union of these increases prior to implementing them. Having made unilateral changes to employees' wages, Rieth-Riley bears the burden of establishing that the changes were in some way privileged. *Fresno Bee*, 339 NLRB 1214, 1214 (2003).

30

35

40

Beginning with the 2018 wage increase, Rieth-Riley first argues that the Union waived its right to bargain over it. The company contends that it gave prior notice of the wage increase to the Union when, on May 18, MITA submitted its initial contract proposal. That proposal contained a \$2-per-hour wage increase effective June 1, 2018. I find this contention nonsensical.

The May 18 contract proposal was not notification of a planned wage increase to be implemented on July 23. It was, as Nystrom himself called it, a “first proposal to initiate negotiations” for a successor contract. In addition, the proposal was a multiemployer contract even though the Union had properly withdrawn from multiemployer bargaining. Rieth-Riley was not privileged to unilaterally implement the 2018 wage increase based upon the Union’s waiver of its right to bargain.¹⁰⁸

Next, Rieth-Riley argues that, once the union’s fringe benefit funds office stopped accepting contributions, Rieth-Riley made those same contributions to employees directly in the form of a wage increase. The record evidence fails to establish that link. Rose and Loney’s letter to employees announcing the wage increase stated that the company now would pay vacation fund contributions directly to employees as a result of Local 324’s refusal to credit fringe payments. Rose also announced that, due to the “inconvenience to employees” created by the Union, the company also was giving the employees a separate wage increase of \$2 per hour. Presumably that inconvenience was the funds’ refusal to accept contributions, but the \$2 per hour increase was but a small fraction of the total fringe benefit cost per hour under the road agreement. The wage increase was not the equivalent of paying employees all of those contributions directly. Even if it had been, Rieth-Riley still was obligated to bargain with the Union before paying contributions directly to employees. The status quo under the road agreement was for those contributions to be made to the funds.¹⁰⁹

Finally as to the 2018 increase, the company claims that the Union’s bad faith bargaining in violation of Sec. 8(b)(1)(B) and 8(b)(3) privileged Rieth-Riley to act. Specifically, Rieth-Riley argues that the Union refused to bargain with Johnston from Ajax Paving (not with Rose from Rieth-Riley) during the time period from August 8 to 28 when its POA with MITA had been rescinded. I do not agree, because Johnston never made an actual request to bargain. Without a doubt, Johnston repeatedly asked Stockwell during that time period for a meeting. However, Johnston carefully worded all of those requests to avoid any suggestion that he wanted a meeting to negotiate a contract. Johnston said the purpose of the meeting was to “lay out [contractors] thoughts to get us all back to the bargaining table”; “not to negotiate” but to “discuss the path forward”; look at the “big picture” and “solving all our problems”; and “not a negotiation at this time but to come to an understanding how we go forward together.” The most specific he got was when he told Stockwell he wanted to discuss how they could set up a union contractor association for purposes of negotiating a multiemployer bargaining agreement. Sorely lacking from his communications is any request that clearly indicates a desire to negotiate and bargain on behalf of Ajax’s operating engineers concerning their terms and conditions of employment in a successor contract. *Crittenton Hospital*, 343 NLRB 717, 740 (2004); *Marysville Travelodge*, 233 NLRB 527, 532 (1977). The proposed topics of discussion had nothing to do with employees’ terms and conditions of employment, but rather the format for future bargaining. Moreover, a bargaining demand, whether written or verbal, must contain

¹⁰⁸ C. Exh. 32.

¹⁰⁹ C. Brf., p. 65; GC Exhs 2 (contract pp. 8–25), 22; C. Exh. 215.

more than merely a suggestion that the parties should meet to discuss representation; if a party's demand does not state its purpose explicitly, it must at least include some indicia of a demand, such as a suggested meeting place and time, proposed topics, and a method for reply.

Williams Enterprises, Inc. v. NLRB, 956 F.2d 1226, 1233–1234 (D.C. Cir. 1992) (union

representative's statement that "he would like to have an opportunity to discuss, perhaps negotiate" was not a request to bargain, but his statements that "we demand you bargain with us in good faith to reach a new agreement and . . . we stand ready to negotiate in good faith with you for a new collective bargaining agreement at any time. A prompt reply would be appreciated." were a valid request). See also *K & S Circuits, Inc.*, 255 NLRB 1270, 1297 (1981); *Sheboygan Sausage Co., Inc.*, 156 NLRB 1490, 1500–1501 (1966). The proposed topics here specifically excluded negotiations. The Union cannot be charged with a refusal of that which is not proffered. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297–298 (1939). The Union did not engage in unlawful bad-faith bargaining.

The 2020 unilateral wage increase involved slightly different circumstances. By June 1, 2020, Rieth-Riley and the Union were negotiating a successor contract, wage increases still were an open issue, and no agreement on a complete contract or an impasse in bargaining had been reached. Where parties are engaged in contract negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter. It encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). Again, Rieth-Riley must establish a privilege for unilaterally implementing the 2020 wage increase.

Relying solely on the Board's decision in *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), the company contends that its 2020 wage increase was justified based on the parties' dynamic status quo. It points to the annual wage increases agreed to by Rieth-Riley and the Union in both the 2008–2013 and 2013–2018 collective-bargaining agreements. Those contracts called for hourly wage increases between \$1 and \$1.40 on June 1 of each year. Rieth-Riley argues that the \$1 per hour increase in 2020 was in adherence to that status quo of annual wage increases in that range.

The concept of dynamic status quo has been described, with Board approval, as follows:

[T]he case law (including the Katz decision itself) makes clear that conditions of employment are to be viewed dynamically and that the status quo against which the employer's "change" is considered must take account of any regular and consistent past pattern of change. An employer modification consistent with such a pattern is not a "change" in working conditions at all.

Robert A. Gorman, Matthew W. Finkin, *Labor Law Analysis and Advocacy*, at 720 (Juris 2013), quoted in *Raytheon*, slip op. at 5. The dynamic status quo doctrine requires an employer to provide a union advance notice and the opportunity for bargaining over an action only when the action differs from a pattern of prior changes that have become an employer's past practice.

5 Applying that doctrine, the Board repeatedly has found that employers unlawfully discontinued, post contract, a status quo providing wage increases where contractual provisions required such increases based upon an employee's anniversary date with the company.¹¹⁰ See, e.g., *Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 9–10 (2016); *Wilkes-Barre General Hospital*, 362 NLRB 1212, 1216–1218 (2015), *enfd.* 857 F.3d 364 (D.C. Cir. 2017). The same
10 holds true for merit-based wage increases. See *Michigan Consolidated Gas Co.*, 261 NLRB 555, 559–562 (1982). However, when a contract includes past wage or benefit increases that are limited to specified years, the post contract status quo does not include automatic annual increases going forward. *Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019) (no
15 dynamic status quo requiring continued annual increases to health care contributions, where expired agreement explicitly limited increases to 2 specified years).

In this case, the contractual wage increases which Rieth-Riley relies upon to establish a dynamic status quo were annual increases tied to specific years. In both prior contracts, the wages provision set out increases on June 1 of each specific year. The increases were not based
20 upon longevity or any other criteria not limited to a specified year. Thus, when the road agreement expired in 2018, the status quo on wages was the hourly rate paid at the time of the expiration, not a dynamic status quo requiring the increases. Rieth-Riley could not unilaterally change that status quo, which it did by increasing the hourly wage rate \$1 in 2020.¹¹¹

25 Rieth-Riley also suggests at varying points that it was privileged to unilaterally grant the 2018 and 2020 wage increases because it had to be compliant with the Davis-Bacon Act. The record evidence, in particular Loney's testimony, does establish that some sort of compensation increase was necessary in those two years in order for the company to be compliant with Davis-Bacon. However, the law did not specifically require that Rieth-Riley grant a wage increase in
30 order to do so. The company had options, including different benefit increases, to ensure its compliance with Davis-Bacon. Where, as here, an employer has discretion in determining how to comply with a law, the employer must bargain with the union over that issue. See, e.g., *Frontier Communications Corp.*, 370 NLRB No. 131, slip op. at 11–12 (2021); *Trojan Yacht*, 319 NLRB 741, 743 (1995). But Rieth-Riley failed to do so.¹¹²

¹¹⁰ Such increases also have been referred to as "longevity" or "experience" based ones.

¹¹¹ In its answer to the General Counsel's complaint, Rieth-Riley pled the dynamic status quo defense only as to its 2020 wage increase. It also similarly pled that its past practices permitted unilateral wage increases, without limitation as to year. Rose also testified that the 2018 wage increase was made in compliance with past practice. Thus, my legal conclusion regarding the lack of a dynamic status quo/past practice privileging unilateral action applies to the 2018 wage increase as well.

¹¹² I further note that the General Counsel's complaint alleges that Rieth-Riley failed to bargain over both the decision to increase wages and the effects of that decision.

Accordingly, Rieth-Riley's 2018 and 2020 unilateral wage increases to its employees violated Section 8(a)(5).¹¹³

IV. DID RIETH-RILEY UNILATERALLY CHANGE THE PAYCHECKS OF
OPERATING ENGINEER EMPLOYEES IN OCTOBER 2018?

The General Counsel's complaint in Case 07-CA-234085 also alleges that Rieth-Riley violated Section 8(a)(5) and (1) of the Act by unilaterally deducting money from the paychecks of unit employees beginning October 27, 2018, related to the vacation fund.

When Rieth-Riley notified employees on July 23, 2018, that it was giving them a compensation increase retroactive to June 1, 2018, it also advised them that vacation fund contributions would no longer be deducted from their paychecks and instead would be paid to the employees directly. Rieth-Riley took this action after the funds refused to credit contractor contributions and because vacation fund contributions are treated as income. The company did not inform the Union of this change to the payment of vacation fund contributions. On October 3, after learning of the Section 9(a) relationship between Rieth-Riley and the Union, the funds advised both entities that fund contributions now would be accepted and credited, as well as that Rieth-Riley owed fund contributions retroactive to June 1. Now having to pay the funds after paying those contributions directly to employees, Rieth-Riley faced the prospect of paying twice. To avoid that outcome, Rieth-Riley implemented payroll deductions for its operating engineer employees beginning the pay period ending October 27, 2018, to claw back the prior direct payments it made to them. Again, because this change impacted employees' wages, it was a mandatory subject of bargaining and the company was required to provide the Union with notice and an opportunity to bargain over the change prior to implementation, unless Rieth-Riley was privileged to act unilaterally.

Rieth-Riley first contends that the Union waived its right to bargain over the claw back. Waiver of a statutory right must be clear and unmistakable. *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip op. at 2 (2018); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708-710 (1983). Establishing waiver is a heavy burden, not to be lightly inferred. *American Medical Response of*

¹¹³ Because the increases in vacation fund contributions in 2018 and 2020 were due to the unlawful wage increases, no need exists to independently evaluate whether those contribution increases were unlawful. In the unlikely event the Union requests rescission of the wage increases, the vacation fund contributions likewise must be rescinded. As to the pension fund contribution increases in 2018, 2019, and 2020, I conclude that those increases were consistent with a dynamic status quo/established past practice. The union fringe benefit funds adopted the pension rehabilitation plan back in 2011, as required by ERISA. The plan required Rieth-Riley to increase contributions each year. It had a 10-year duration, meaning the plan still was in effect at the time of the 2018, 2019, and 2020 increases and would not expire until 2021. This obligation was outside of the parties' collective-bargaining agreement. The record does not establish that Rieth-Riley had any discretion in complying with the rehabilitation plan. Thus, the pension fund contribution increases were lawful. See *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964).

Connecticut, Inc., 361 NLRB 605, 605 (2014), affg. 359 NLRB 1301, 1302 (2013); *Georgia Power Co.*, 325 NLRB 420, 420–421 (1998). Although waiver can occur in three ways, Rieth-Riley relies here solely on the conduct of the parties (including past practices, bargaining history, and action or inaction). *American Diamond Tool*, 306 NLRB 570, 570 (1992).

5 The record evidence establishes that Rose proposed the contribution claw back to Stockwell on October 11 and asked Stockwell to let him know if the Union wanted to “discuss” the matter. On that same date, Rose also asked Stockwell for dates to begin contract negotiations. Stockwell responded on October 15, saying the Union expected Rieth-Riley to
10 make the funds whole and suggested that the claw back proposal would violate Federal and/or State law, as well as the contract. That same day, Rose asked Stockwell if he was refusing to bargain, to which Stockwell later replied that Rose was free to bring up the subject in contract negotiations. Stockwell’s conduct does not amount to a waiver. After Rose notified Stockwell of the proposed change, Stockwell objected to it and suggested they address the issue in
15 contract negotiations. Asserting such an opposition prevents a waiver finding. See *Intermountain Rural Electric Assn.*, 305 NLRB 783, 787 (1991); Cf. *American Diamond Tool*, supra. Furthermore, because of the Section 9(a) relationship between Rieth-Riley and the Union, the company had to maintain the status quo while successor contract negotiations were ongoing. The status quo under the expired road agreement required Rieth-Riley to make vacation fund
20 contributions for employees from June 1, 2018 forward. What Rose was proposing was a modification to that status quo which the Union was free to reject, as Stockwell did.

Rieth-Riley also argues that an economic exigency existed permitting it to unilaterally implement the money claw back. An employer may lawfully make a unilateral change “when
25 economic exigencies compel prompt action.” *Bottom Line Enterprises*, 302 NLRB at 374. The Board has limited this exception to “extraordinary events which are ‘an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.’” *RBE Electronics of S.D., Inc.*, 320 NLRB at 81 (quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)). A loss of significant accounts or contracts, operation at a competitive disadvantage, or
30 supply shortages are not economic exigencies. *Harmon Auto Glass*, 352 NLRB 152, 154–155 (2008); *Pleasantview Nursing Home, Inc.*, 335 NLRB 961, 962–963 (2001), enfd. in relevant part 351 F.3d 747, 755–756 (6th Cir. 2003). The burden is on the employer to prove that it experienced such dire and unforeseen circumstances, and that burden is “heavy.” *Alpha Associates*, 344 NLRB 782, 785 (2005).

35 I conclude that Rieth-Riley did not meet its burden. To begin, Rose did not move with urgency after learning of the claimed exigency. In August, Rose discovered that Rieth-Riley had a Section 9(a) bargaining relationship with the Union. Given that relationship, the company was required to maintain the status quo following expiration of the road agreement.
40 That status quo included deducting vacation fund contributions from employees’ paychecks and remitting them to the union fringe benefit funds office. Once the 9(a) relationship was established, the company immediately could have notified the funds and resumed making contributions. That the funds office also eventually would come calling for retroactive

contributions back to June 1 was reasonably foreseeable. Yet Rose waited for official notification from the funds, which came more than a month later on October 3, before notifying the Union of the proposed claw back. The length of time that elapsed before Rose acted contradicts the claim that time was of the essence and an economic exigency existed. *Metro*

5 *Mayaguez, Inc.*, 356 NLRB 1204, 1214–1215 (2011).

Next, Rieth-Riley claims that the claw back had to be expediently implemented, because all the fund contributions had to be made by the end of 2018 pursuant to the road agreement, and because Michigan law only permits gradual deductions of employee paychecks. However,

10 no specific evidence was introduced to substantiate that those conditions could be met only by implementing the claw back by October 27. And Rose did not contemporaneously inform Stockwell of these claimed reasons for seeking the almost immediate implementation of the claw back.

Finally, the evidence also fails to establish that not recouping the amount in question would have a “major economic effect” on Rieth-Riley’s finances. The company simply relies upon the need to make a double payment of \$800,000. That amount obviously is nothing to sneeze at and amounts to a material change. However, without further context, it fails to satisfy the required burden. Standing alone, the amount is akin to a loss of significant accounts or a

15 competitive disadvantage. The desire to save money in business operations also does not amount to an economic exigency. *Wendt Corp.*, 369 NLRB No. 135, slip op. at 6 (2020).

20

Having not established a privilege to imposing the vacation fund claw back, Rieth-Riley’s unilateral action violated Section 8(a)(5) and (1).¹¹⁴

¹¹⁴ On July 18, 2019 and following the issuance of the General Counsel’s complaint in Case 07–CA-234085, Loney notified Stockwell that Rieth-Riley was rescinding its decision to claw back the vacation fund contributions from employees and that it would repay employees all the monies that had been deducted from their paychecks. (C. Exh. 104; Tr. 918–921, 1580.) Loney also sent a memo to employees with the same notification, including that Rieth-Riley was double paying them as a result of the rescission. The memo to employees further stated:

We recognize Local 324 as your exclusive bargaining representative. Therefore, under the National Labor Relations Act, Local 324 has the right to notice and the opportunity to bargain about changes to terms and conditions of your employment. We will not interfere with any of your rights to engage in, or refrain from engaging in activities authorized by the National Labor Relations Act.

We will give Local 324 notice and the opportunity to bargain regarding any future changes about vacation pay and will bargain collectively and in good faith with the Union as your exclusive collective -bargaining representative concerning wages, hours, rates of pay, and other terms and conditions of employment.

As a reminder, federal law gives you the right to:

- Form, join, or assist a union;

V. ARE RIETH-RILEY'S OPERATING ENGINEERS ENGAGING
IN AN UNFAIR LABOR PRACTICE STRIKE?

5 The last General Counsel complaint allegation in Case 07–CA–234085 is that certain Rieth-Riley unit employees represented by the Union went on strike on July 31, 2019, at various locations throughout the State of Michigan. The complaint further alleges that the strike was caused by the unfair labor practices in that case discussed above.

10 When a strike is caused, “in whole or in part”, by an employer’s unfair labor practice, it is an unfair labor practice strike. *Precision Concrete*, 337 NLRB 211, 213 (2001) (citing *Citizens National Bank of Willmar*, 245 NLRB 389, 391 (1979), enfd. mem. 644 F.2d 39 (D.C. Cir. 1981)). The unfair labor practices need not be the sole or major cause or an aggravating factor; they need only be a contributing factor. *RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1633 (2001) (citing *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990)). In determining whether
15 the General Counsel has met the burden of establishing that an employer's unfair labor practices caused the employee's decision to go on strike, the Board looks to the employees' motivations for striking, considering both objective and subjective evidence. See, e.g., *Chicago Beef*, 298 NLRB 1039, 1039 (1990), enfd. 944 F.2d 905 (6th Cir. 1991); *C-Line Express*, 292 NLRB
20 638, 638 (1989). “Applying objective criteria, the Board and reviewing court may properly consider the probable impact of the type of unfair labor practice in question on reasonable employees in the relevant context.” *C-Line Express*, supra, quoting *Soule Glass Co. v. NLRB*, 652 F.2d 1055, 1080 (1st Cir. 1980). “Applying subjective criteria, the Board and court may give
25 substantial weight to the strikers’ own characterization of their motive for continuing to strike after the unfair labor practice.” *Ibid*. The causal connection between unfair labor practices and a strike may be inferred from the record as a whole. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145, 1145 (1995), enfd. 77 F.3d 461 (3d Cir. 1996).

-
- Choose a representative to bargain with us on your behalf;
 - Act together with other employees for your benefit and protection;
 - Choose not to engage in any of these protected activities.

Rieth-Riley will NOT interfere with, restrain or coerce you in the exercise of the above rights.

Prior to providing this Memorandum to you we have notified via email Doug Stockwell and Ken Dombrow from the Union of the Company's decision.

I find Rieth-Riley’s actions are insufficient under *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978), to repudiate its unlawful claw back of the vacation fund contributions. The actions were untimely as they occurred roughly 9 months after the unlawful conduct and about 2 months after the General Counsel issued the complaint in Case 07–CA–234085. Rieth-Riley also did not provide its letter and the monetary remedy for its unfair labor practice to all of its operating engineer employees. (Tr. 1660–1661, 1676–1677.)

Beginning with the objective evidence, the Union sought the authority to authorize the initiation of a strike at a general membership meeting in June 2018. The members were from all road agreement contractors, not just Rieth-Riley. They voted in favor of granting that authorization to the Union. At the time, the road agreement had expired but none of the alleged unfair labor practices in Case 07–CA–234085 had occurred. In particular, the alleged unlawful lockout did not take place until September 4 through 27, 2018. Thus, the members’ vote authorizing a strike could not have been motivated by then nonexistent unfair labor practices.

On July 25, 2019, the Union held a membership meeting of just Rieth-Riley employees. At the meeting, Stockwell discussed the status of negotiations overall and with Rieth-Riley. Members also were provided with copies of the General Counsel’s complaint in Case 07–CA–234085. The General Counsel issued that complaint on May 29, 2019, which was premised on an unfair labor practice charge the Union filed on January 11, 2019. Thereafter, Dombrow went over the allegations and advised the group that Rieth-Riley rejected a \$1.8 million settlement proposal from the government. According to Dombrow, multiple members insisted on going on strike and asked questions about the NLRB case and how long it would take to get resolved.¹¹⁵ However, it is unclear in the record what the sequence of those statements was, i.e. whether members insisted on going on strike before or after learning of the complaint. The meeting ended with officials telling the members that the Union would let them know what the Union decided concerning a strike. The Union did not have members vote on whether to strike. During a negotiation session 4 days after this meeting, the Union rejected Rieth-Riley’s subcontracting proposal which would have applied the Union’s desired language to only seven counties in Michigan. Stockwell decided either that day or the next to initiate the strike and relied upon the strike vote taken in June 2018. While on strike, picketers carried signs stating: “unfair labor practice” and Rieth-Riley’s name, along with the Union either being on strike or having no contract with the company.

Rieth-Riley’s employees may very well have gone on strike, in part, to protest the company’s unfair labor practices, but this objective evidence is insufficient to establish that fact. Most critically, the Union did not call for a strike vote by the Rieth-Riley operating engineers at the July 25, 2019 meeting or any other time prior to Stockwell initiating the strike. The Union’s failure to do so is confounding. Moreover, had the employees voted to strike after the discussion of the General Counsel’s complaint, then it would be possible to infer that the strike was an unfair labor practice strike. See *Citizens Publishing and Printing Co.*, 331 NLRB 1622, 1623 (2000) (after being advised that the General Counsel intended to issue a complaint against an employer for subcontracting unit work to non-unit individuals, members voted to strike and engaged in unfair labor practice strike); *Lifetime Door Co.*, 179 NLRB 518, 523 (1969) (employees engaged in unfair labor practice strike when they voted to strike after being advised of employer’s refusal to provide information which was later found to be unlawful). Instead, in

¹¹⁵ Tr. 2587–2590.

initiating the strike, the Union relied upon a general strike authorization vote of members of all road agreement contractors taken back in June 2018, prior to any of the alleged unfair labor practices. At that time, the only reason for authorizing such a strike was to increase the Union's bargaining leverage in successor contract negotiations.

5

What remains in this record is Dombrow's and Stockwell's hearsay testimony which, if relied upon, establishes nothing more than that, at the July 25, 2019 meeting, an unidentified number of employees insisted on going on strike, as well as asked questions about the NLRB case and how long it would take to get resolved. If employees had insisted on going on strike after learning about the General Counsel's complaint and Rieth-Riley's rejection of the \$1.8 million settlement offer, then it likewise could be inferred that the strike was an unfair labor practice strike. But neither Dombrow nor Stockwell testified about the sequence of those events.

15

As to timing, the unlawful lockout occurred back in September 2018, 10 months before the strike. The Union first alleged it as unlawful in an unfair labor practice charge filed in January 2019, 6 months before the strike. The General Counsel's complaint issued at the end of May 2019, 2 months before the strike. At no point in that sequence did the Union initiate a strike. Rather, it waited until a day or 2 after Rieth-Riley submitted a subcontracting proposal that was wholly unacceptable to the Union. Thus, timing also does not support the conclusion that the strike was caused by Rieth-Riley's unfair labor practices. Cf. *Citizens Publishing and Printing Co.*, supra at 1634, fn. 42 (strike called 3 (not 10) months after the ULP was committed and 3 days (not 2 months) after union learned that the General Counsel would issue a complaint against the employer was unfair labor practice strike).

25

As to the picket signs used by strikers, the text did indicate that Rieth-Riley's unfair labor practices were to blame for the strike. Nevertheless, the language on a picket sign is not controlling in determining what caused a strike, when other evidence indicates a different object. *SCA Services of Georgia, Inc.*, 275 NLRB 830, 858 (1985) (citing *Happ Bros. Co.*, 90 NLRB 1513, 1516 (1950), enf. denied on other grounds 196 F.2d 195 (5th Cir. 1952)).

30

Thus, the objective facts do not support a finding of an unfair labor practice strike.

35

As to subjective evidence, the record is devoid of any because neither the General Counsel nor the Union called any employees to testify concerning their reasons for striking prior to the initiation of the strike. Although not a per se requirement, such employee testimony often has been a component of past findings of unfair labor practice strikes. See, e.g., *RGC (USA) Mineral Sands*, supra at 1633–1634; *Precision Concrete*, supra at 212–213. The General Counsel did call three union officials to establish the cause of the strike. Stockwell testified that he initiated the strike (on his own) in part because he wanted the members to recoup the \$1.8 million lost due to the unlawful lockout. Dombrow and McKernan likewise testified that the lockout was one of the reasons for the strike. However, the three union officials' reasons for initiating the strike are irrelevant as a matter of law. *C-Line Express*, supra at 638 (citing *Soule*

40

Glass, supra at 1080) (a union official's testimony about what caused a strike, standing alone and uncorroborated by employees, is self-serving and insufficient to demonstrate causation).

Finally, certain types of unfair labor practices by their nature will have a reasonable tendency to cause or prolong a strike and therefore afford a sufficient and independent basis for finding an unfair labor practice strike. *C-Line Express*, supra. Examples include an unlawful withdrawal of recognition; an unlawful discharge of strikers; and unlawful threats to relocate unit work due to a strike. *Id.* at 639; *Gloversville Embossing Corp.*, 297 NLRB 182, 183 (1989); *Titan Tire Corp.*, 333 NLRB 1156, 1157 (2001). These unfair labor practices fall into two categories. They either put an end to, strike at the very heart of, or otherwise burden the collective-bargaining process, or they put an end to strikers' employment. *Titan Tire Corp.*, supra; *Vulcan-Hart Corp.*, 262 NLRB 167, 168 (1982), enf. denied on other grounds 718 F.2d 269 (8th Cir. 1983).

The unfair labor practices here included an unlawful lockout to require the Union to engage in multiemployer bargaining; two unlawful unilateral wage increases; and the unlawful deduction of money from employees' paychecks to pay vacation fund contributions, which ultimately Rieth-Riley repaid to employees. These are significant unfair labor practices. What is missing, though, is any impact on the collective-bargaining process or employees' long-term job security. All of the unfair labor practices occurred prior to the Union and Rieth-Riley beginning contract negotiations. The failure to reach overall agreement on a contract is due to disagreements over subcontracting and other terms and conditions of employment, including wages, fringe benefits, profit sharing, a hiring hall, and jurisdiction. The unfair labor practices have not burdened the collective-bargaining process. In addition, the lockout, while costly to employees, was temporary.¹¹⁶ Employees ultimately returned to work. Unlike a withdrawal of recognition, a discharge from employment, or relocation of unit work, the lockout did not put an end to the workers' employment or to the bargaining relationship between the Union and Rieth-Riley.

For all these reasons, I conclude that the record evidence is insufficient to establish that Rieth-Riley's unfair labor practices caused the Union's strike against it. Therefore, the complaint allegation in paragraph 12(b) is dismissed.¹¹⁷

¹¹⁶ Tr. 2577. Taking the \$1.8 million settlement offer from the General Counsel and dividing by 129 locked out employees, each employee would be owed just short of \$14,000.

¹¹⁷ Many of the legal principles described here arose in cases dealing with whether an economic strike had been converted to an unfair labor practice strike. Nonetheless, the same principles apply in determining whether a strike at its inception is an unfair labor practice strike. See *3D Enterprises Contracting Corp.*, 334 NLRB 57, 76 (2001).

VI. DID UNION AGENTS' STATEMENTS TO REPRESENTATIVES OF
VARIOUS CONTRACTORS FOLLOWING EXPIRATION OF
THE ROAD AGREEMENT VIOLATE SECTION 8(B)(1)(B)?

5 The General Counsel's complaint in Case 07-CB-226531 alleges that the Union violated
Section 8(b)(1)(B) of the Act on six occasions in June and July 2018, when union agents verbally
notified employer-members of MITA that the Union would not negotiate a new collective-
bargaining agreement with them if MITA was their bargaining representative. One of the six
occasions also is alleged as a Section 8(b)(3) violation, because the union agent's statements
10 were made to a representative of Payne & Dolan, a Section 9(a) contractor. The General
Counsel's original theory was that, although the Union properly withdrew from multiemployer
bargaining and could refuse to bargain in that format, the Union did not have the right to refuse
to negotiate on a single employer basis with MITA, if a contractor chose MITA as its bargaining
representative.

15 Prior to addressing the substance of these allegations, a preliminary matter must be
discussed. On March 29, 2021, during an adjournment of the hearing, the General Counsel filed
with me a motion to sever Case 07-CB-226531 from this proceeding and to approve the General
Counsel's withdrawal of the complaint in that case. The motion was premised upon the
20 General Counsel's reconsideration of the complaint allegations in light of evidence adduced at
the hearing. In particular, the General Counsel was unaware until subpoenaed document
production from MITA of the existence of the all-for-one agreement between MITA and
numerous contractors. That agreement bound the contractors to multiemployer bargaining.
Via order dated April 9, 2021, I denied the motion, principally because the hearing already had
25 proceeded for 13 days and evidence had been presented by MITA in support of the General
Counsel's complaint allegations in Case 07-CB-226531. In the posthearing brief, the General
Counsel renews the motion. I again deny it for the reasons stated in my April 9, 2021 order and
instead will rule on the merits of the complaint allegations. In that regard, the General Counsel
now moves to dismiss the complaint allegations in Case 07-CB-226531. This puts MITA, as the
30 Charging Party in that case, in the rare position of assuming the responsibility of proving the
government's complaint allegations.

35 Section 8(b)(1)(B) of the Act prohibits unions from restraining or coercing employers in
their selection of representatives for the purposes of collective bargaining. *Writers Guild of
America West, Inc. (Universal Network Television, LLC)*, 350 NLRB 393, 399 (2007). The proscribed
conduct may be applied directly against the employer to force the employer to select or replace
an 8(b)(1)(B) representative or indirectly against the employer's 8(b)(1)(B) representative to
adversely affect the manner in which the representative performs the covered functions of
collective bargaining, grievance processing, or related activities. *Ibid.* This case falls into the
40 first category of direct conduct against employers to replace a bargaining representative. A
primary concern of Congress in enacting Section 8(b)(1)(B) was to "prevent unions from trying
to force employers into or out of multiemployer bargaining units." *Florida Power & Light Co. v.
IBEW Local 641*, 417 U.S. 790, 803 (1974). Section 8(b)(3) makes it an unfair labor practice for a

union to refuse to bargain collectively with an employer, provided the union is a Section 9(a) representative of the employer's employees. A union's refusal to meet with a Sec. 9(a) employer's lawful representative to bargain collectively violates both Section 8(b)(1)(B) and 8(b)(3). *Asbestos Workers Local 27 (Master Insulators)*, 263 NLRB 922, 923 (1982).

To summarize the record evidence, the statements in question all occurred in conversations between union representatives and contractor project managers during June and July 2018, after the road agreement expired. Union Representative Kroll told Sonnentag, a construction manager at Zenith Tech, that the company needed to sign off the POA with MITA and deal directly with the Union. Second, Sonnentag asked Union Agent Edwardson what he could do to get the Escanaba job going again. Edwardson responded that, as soon as Zenith Tech signed off the POA with MITA for the road agreement and negotiated directly with the Union, he could get his operators back to work. Third, Union Agent Hartwell told Coolsaet, the president of R.L. Coolsaet Construction, that the Union no longer had a contract, MITA had his POA, and he could not give Coolsaet any apprentices. He also said that, if Coolsaet signed the contract which the Union had drafted, he could get apprentices. Fourth, Union Agent Salisbury told Eriksson, Hoffman Brothers' general superintendent, that the Union would not have an agreement with MITA and that, until Hoffman Brothers signed a contract outside of MITA, it would not get any operators. Fifth, union agent Shippa told Eriksson that Hoffman Brothers needed to get away from MITA and sign the contract. Finally, Union Agent Edwardson asked Payne & Dolan vice president Bartozek to sign on to the Union's agreement with AGC and the Union was not going to negotiate with MITA.

The test of whether a statement is unlawful is whether the remark can reasonably be interpreted to threaten, restrain, or coerce. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1066 (2007), *enfd.* 577 F.3d 467 (2nd Cir. 2009); *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011). In the Section 8(b)(1)(B) context, the prohibition is on statements which restrain or coerce employers in their selection of a bargaining representative. What the union agent subjectively intended by the comment and the subjective state of mind of the person who heard the statement is not determinative. *United Steel Workers of America Local 1397, AFL-CIO (United Steel Corp.)*, 240 NLRB 848, 849 (1979). In addition, the statement itself cannot be viewed in a vacuum but rather in context, in order to determine if under all the circumstances it would have a tendency to restrain and coerce. *American Postal Workers Union, AFL-CIO*, 328 NLRB 281, 282 (1999) (citing *Letter Carriers Local 233 (Postal Service)*, 311 NLRB 541, 545 (1993)).¹¹⁸

Under the totality of the circumstances, I conclude that none of the statements restrained or coerced the contractors from selecting MITA as their bargaining representative for individual

¹¹⁸ The Board has utilized this test to find violations of Sec. 8(a)(1) and 8(b)(1)(A), which prohibit coercive statements by employers and unions to employees. To my knowledge, the Board has not addressed allegations that a union representative's direct statements to an employer representative to select or replace its bargaining representative violated Sec. 8(b)(1)(B). Nonetheless, because all three sections of the Act prohibit restraint and coercion by employers or unions, I find it appropriate to apply the same standard to the Sec. 8(b)(1)(B) allegations here.

or coordinated negotiations. At the time the statements were made, the Union properly had withdrawn from multiemployer bargaining and instead wished to bargain with contractors individually. The Union had every right to insist that bargaining not be on a multiemployer basis. In their statements, the union representatives repeatedly said that they wanted the contractors to deal or negotiate directly with the Union. Consistent with that desire, certain representatives also stated that they wanted the contractor to sign an individual agreement. Those statements are noncoercive because the Union was not trying to get the employers out of multiemployer bargaining. It already had properly withdrawn from multiemployer bargaining.

The more difficult issue is the union representatives' repeated statements that the contractors needed to either sign off their POAs with MITA or sign a contract outside of MITA, as well as that the Union was not going to negotiate or have an agreement with MITA. The context of the statements is key because it reflects that the individuals to whom the statements were made objectively would equate MITA with multiemployer bargaining. At the time the statements were made, the involved contractors still were members of MITA and had executed the all-for-one agreement. That agreement prohibited them from negotiating individually with the Union and subjected them to damages for doing so. The Union also had withdrawn from multiemployer bargaining with MITA. Unsurprisingly then, the contractor managers knew that their employers wanted to bargain as a group and the Union wanted to bargain individually. What they did not know is that the Union could not refuse to bargain with the individual contractor, if the contractor designated MITA as its bargaining representative. None of the contractor representatives were labor law attorneys familiar with the legal distinction between the ability of a union to withdraw from multiemployer bargaining but not to refuse to bargain with a contractor's chosen bargaining representative, even if that representative was the same multiemployer bargaining association. Given that context, the representatives reasonably and objectively would understand MITA to mean multiemployer bargaining, especially given that, to their knowledge, MITA only had bargained on a multiemployer basis. Thus, when the union agents referenced MITA in these statements, the objective meaning was that the Union would not engage in multiemployer bargaining with the contractors.

Accordingly, I conclude that the record evidence fails to establish that the Union violated Section 8(b)(1)(B) and 8(b)(3) based upon the statements alleged to be unlawful in the CB complaint. The CB complaint is dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent Rieth-Riley Construction Co., Inc. (Rieth-Riley) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Charging Party Michigan Infrastructure and Transportation Association, Inc. (MITA) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Charging Party/Respondent Local 324, International Union of Operating Engineers, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.
- 5 4. The Union is, and at all material times was, the exclusive collective-bargaining representative of the following appropriate unit: operating engineers employed by Rieth-Riley in the State of Michigan in building construction, underground construction, and/or heavy, highway and airport construction, at the site of construction, repair, assembly and erection, including equipment operators, field
10 mechanics, oilers, apprentices, and on the job trainees; but, excluding employees represented by other labor organizations, and professional, office and clerical employees, guards and supervisors as defined under the Act.
- 15 5. Rieth-Riley violated Section 8(a)(5) and (1) by locking out union members in support of a demand that the Union agree to bargain on a multiemployer basis, thereby changing the scope of the bargaining unit, a permissive subject of bargaining.
- 20 6. Rieth-Riley violated Section 8(a)(5) and (1) by unilaterally granting employees a wage increase in 2018 and 2020, as well as by unilaterally deducting money from employees' paychecks related to vacation fund contributions in 2018, without having reached a collective-bargaining agreement or a good-faith impasse in bargaining with the Union for a successor contract.
- 25 7. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.
8. Rieth-Riley has not violated the Act in any of the other manners alleged in the amended complaint in Case 07-CA-234085.
- 30 9. The Union has not violated the Act in any of the manners alleged in the complaint in Case 07-CB-226531.

REMEDY

35 Having found that Rieth-Riley engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

40 Having found that Rieth-Riley unlawfully locked out unit employees from September 4 to 27, 2018, I order Rieth-Riley to make those employees whole for any loss of earnings and other benefits incurred by them as a result of the unlawful lockout, less any net interim earnings. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289

(1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), I also order Rieth-Riley to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Having found that Rieth-Riley unilaterally changed the terms and conditions of employment of unit employees on July 23, 2018, October 27, 2018, and June 1, 2020, I order it, on request, to bargain with the Union as the exclusive collective-bargaining representative of unit employees, before implementing any changes to their wages, hours, or other terms and conditions of employment. I also order it to retroactively restore any unilaterally modified terms and conditions of employment (but not if a change improved employees' terms and conditions, unless the Union so requests), until such time as Rieth-Riley and the Union reach an agreement for a new collective-bargaining agreement, or a lawful impasse based on good-faith negotiations. Rieth-Riley also must make whole the unit employees for any loss of wages or other benefits suffered as a result of the unilateral changes in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River*, supra.

For all backpay awards received by unit employees, I order Rieth-Riley to compensate the employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 7 allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In addition, I order Rieth-Riley to file with the Regional Director for Region 7 a copy of unit employees' corresponding W-2 form(s) reflecting the backpay award. *Cascade Containerboard Packaging--Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹⁹

ORDER

Rieth-Riley, of Goshen, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (a) Locking out union members in support of a demand that the Union agree to multiemployer bargaining (a change in the scope of the bargaining unit), a permissive subject of bargaining.
- 5 (b) Unilaterally changing unit employees' terms and conditions of employment, without first providing the Union with notice and the opportunity to bargain over the changes.
- 10 (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
- 15 (a) Make whole those employees who were locked out from September 4 to 27, 2018, for any loss of earnings and other benefits they suffered as a result of its unlawful lockout, in the manner set forth in the remedy section of this decision.
- 20 (b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful lockout as it pertains to each affected employee, and within 3 days thereafter, notify the employees in writing that this has been done and that the lockout will not be used against them in any way.
- 25 (c) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:
- 30 Operating engineers employed by Rieth-Riley in the State of Michigan in building construction, underground construction, and/or heavy, highway and airport construction, at the site of construction, repair, assembly and erection, including equipment operators, field mechanics, oilers, apprentices, and on the job trainees; but, excluding employees represented by other labor organizations, and professional, office and clerical employees,
- 35 guards and supervisors as defined under the Act.
- 40 (d) Upon the Union's request, restore the bargaining-unit employees' terms and conditions of employment to the status quo that existed prior to the implementation of the unlawful unilateral changes on July 23, 2018, October 27, 2018, and June 1, 2020, and continue them in effect until the parties reach an agreement or good-faith impasse in bargaining, but not cancel any unilateral changes that benefited unit employees unless the Union requests it.

- (e) Make whole the unit employees for any losses suffered by reason of the unlawful changes in terms and conditions of employment on July 23, 2018, October 27, 2018, and June 1, 2020, in the manner set forth in the remedy section of this decision.
- (f) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.
- (g) File with the Regional Director for Region 7 a copy of unit employees' corresponding W-2 form(s) reflecting the backpay award.
- (h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (i) Within 14 days after service by the Region, post at its Goshen, Indiana facility and all of its facilities in the State of Michigan copies of the attached notice marked "Appendix."¹²⁰ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by Rieth-Riley's authorized representative, shall be posted by Rieth-Riley and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Rieth-Riley customarily communicates with its employees by such means. Reasonable steps shall be

¹²⁰ If a facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if Rieth-Riley customarily communicates with its employees by electronic means.

If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

taken by Rieth-Riley to ensure that the notices are not altered, defaced, or covered by any other material. If Rieth-Riley has gone out of business or closed the facilities involved in these proceedings, Rieth-Riley shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Rieth-Riley at any time since July 23, 2018.

- (j) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Rieth-Riley has taken to comply.

Dated, Washington, D.C., January 21, 2022.



Charles J. Muhl
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully lock out union members in support of our demand that Local 324 of the International Union of Operating Engineers (the Union) agree to multiemployer bargaining (a change in the scope of the bargaining unit), a permissive subject of bargaining.

WE WILL NOT make unilateral changes to unit employees' terms and conditions of employment, without first providing the Union with notice of and the opportunity to bargain over the changes.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole those employees who were unlawfully locked out from September 4 to September 27, 2018, for any loss of earnings and other benefits they suffered as a result of our unlawful lockout, less any net interim earnings, plus interest, and WE WILL also make those employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful lockout as it pertains to each affected employee, and WE WILL, within 3 days thereafter, notify each of you in writing that this has been done and that the lockout will not be used against you in any way.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit, before implementing any changes to your wages, hours, or other terms and conditions of employment:

Operating engineers employed by Rieth-Riley in the State of Michigan in building construction, underground construction, and/or heavy, highway and airport construction, at the site of construction, repair, assembly and erection, including equipment operators, field mechanics, oilers, apprentices, and on the job trainees; but, excluding employees represented by other labor organizations, and professional, office and clerical employees, guards and supervisors as defined under the Act.

WE WILL, on the Union's request, restore all terms and conditions of employment for our unit employees that existed prior to the unilateral changes we implemented on July 23, 2018, October 27, 2018, and June 1, 2020, and continue them in effect until the parties reach an agreement or a good-faith impasse in bargaining, but WE WILL NOT cancel any unilateral changes that benefited our unit employees unless the Union asks us to do so.

WE WILL make you whole, with interest, for any losses you suffered by reason of the unlawful changes in terms and conditions of employment we made on July 23, 2018, October 27, 2018, and June 1, 2020.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL file with the Regional Director for Region 7 copies of all affected employees' corresponding W-2 forms reflecting the backpay awards.

RIETH-RILEY CONSTRUCTION CO., INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/07-CA-234085 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING
AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY
QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE
DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (313) 335-8042.